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EDITOR'S NOTE

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No. 86-805-CFX
Status: GRANTED

Docketed:
November 17, 1986

Title: Michael Boos, J. Michael Waller and Bridget Brooker, Petitioners
v.
Marion S. Barry, Jr., Mayor, District of Columbia, et al.

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Battocchi, Raymond D.

Counsel for respondent: Solicitor General, Schwab, Edward, Arif, Michael S.

Entry	Date	Note	Proceedings and Orders
1	Nov 17 1986	G	Petition for writ of certiorari filed.
2	Nov 17 1986		Appendix of petitioner Michael Boos, et al. filed.
4	Dec 17 1986		Order extending time to file response to petition until January 15, 1987.
5	Jan 7 1986		Brief of respondents Barry, Mayor, et al. in opposition filed.
6	Jan 14 1987		DISTRIBUTED. February 20, 1987
7	Jan 14 1987	X	Brief of respondent Father David Finzer in opposition filed.
9	Feb 23 1987		Petition GRANTED.
			**********
10	Mar 4 1987		Record filed.
11	Mar 4 1987		Certified copy of original record and proceedings received.
13	Mar 19 1987		Order extending time to file brief of petitioner on the merits until May 9, 1987.
14	Apr 4 1987		Joint appendix filed.
15	May 1 1987		Order further extending time to file brief of petitioner on the merits until May 16, 1987.
16	May 14 1987		Brief amicus curiae of Washington Legal Foundation, et al. filed.
17	May 14 1987		Brief amicus curiae of American Jewish Congress filed.
18	May 15 1987		Brief of petitioners Michael Boos, et al. filed.
19	May 16 1987		Brief of respondent Father David Finzer filed.
20	May 16 1987		Brief amicus curiae of Geraldine M. Lipkin, et al. filed.
21	May 16 1987		Brief amicus curiae of ACLU, et al. filed.
22	May 16 1987		Brief amicus curiae of Legal Affairs Council, et al. filed.
24	Jun 5 1987		Order extending time to file brief of respondent on the merits until July 22, 1987.
25	Jul 16 1987		Order further extending time to file brief of respondent on the merits until July 29, 1987.
26	Jul 29 1987		Order further extending time to file brief of respondent on the merits until August 8, 1987.
27	Aug 3 1987		Application of the Solicitor General for leave to file a brief as amicus curiae in excess of the page limits
28	Aug 3 1987		filed (A-108), and order granting same by Rehnquist, C.J., on Aug. 5, 1987. The brief may not exeed 38 pages.
29	Aug 13 1987		CIRCULATED.
30	Aug 8 1987	X	Brief of respondents Barry, Mayor, et al. filed.
31	Aug 7 1987		Brief amicus curiae of United States filed.

APP

No. 86-803-CFX

Entry	Date	Note	Proceedings and Orders
32	Aug 13 1987	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
33	Aug 31 1987		SET FOR ARGUMENT. Monday, November 9, 1987. (4th case).
34	Sep 21 1987		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
35	Sep 17 1987	D	Motion of Legal Affairs Council, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
36	Oct 5 1987		Motion of Legal Affairs Council, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.
37	Oct 30 1987	X	Reply brief of petitioners Michael Boos, et al. filed.
38	Nov 9 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86-803

No. 86-

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

MICHAEL BOOS, J. MICHAEL WALLER and
BRIDGET BROOKER,
Petitioners,

v.

MARION S. BARRY, JR., MAURICE T. TURNER,
THE DISTRICT OF COLUMBIA and
FATHER R. DAVID FINZER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Does the Constitution allow Congress to make peaceful free speech within 500 feet of a foreign government's buildings a crime?

2. May Congress pass a law abridging free speech solely because it acts pursuant to Article I, Section 8, which empowers Congress to define and punish offenses against the law of nations?

3. Does the Constitution permit Congress to pass a law prohibiting the peaceful expression of views which bring a foreign government or its officers into "public disrepute" or "public odium" anywhere within 500 feet of a foreign building, and allowing the police to disperse any group congregating there for any reason, especially when the law allows insulting free speech and congregations by parties to labor disputes, and allows anyone to express views favorable to the foreign government?

PARTIES TO THE PROCEEDINGS

Petitioners are Michael Boos, J. Michael Waller, and Bridget Brooker. Each was an appellant in the Court of Appeals for the District of Columbia Circuit.

Respondents are Marion S. Barry, Jr., Maurice T. Turner and the District of Columbia, who were appellees in the court below, and Father R. David Finzer, who was an appellant in the court below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	i
OPINIONS AND JUDGMENT BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	7
I. THE DECISION BELOW RESOLVES SEVERAL IMPORTANT FIRST AMENDMENT ISSUES IN CONFLICT WITH DECISIONS OF THIS COURT, AND HAS GIVEN AN ERRONEOUS AND FAR REACHING INTERPRETATION TO ARTICLE I, SECTION 8, WHICH MERITS REVIEW	8
II. WHETHER THE STATUTE VIOLATES EQUAL PROTECTION BY ALLOWING PARTIES TO LABOR DISPUTES TO PARTICIPATE IN DEMONSTRATIONS INSULTING TO FOREIGN OFFICIALS IS LIKEWISE OF PUBLIC IMPORTANCE APPROPRIATE FOR CONSIDERATION BY THE COURT	15
III. THE DECISION BELOW ERRONEOUSLY CONCLUDED THAT THE STATUTE IS NOT UNCONSTITUTIONALLY OVERBROAD AND VAGUE. ITS DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND DESERVES REVIEW	16
IV. WHETHER THE SECOND CLAUSE OF THE STATUTE, WHICH ALLOWS THE POLICE TO DISPERSE CONGREGATIONS AT THEIR WHIM, IS UNCONSTITUTIONAL ALSO WARRANTS REVIEW	18
CONCLUSION	20

TABLE OF AUTHORITIES

Cases: Page

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 17
Buckley v. Valeo, 421 U.S. 1 (1976) 19
Carey v. Brown, 447 U.S. 455 (1980) 15, 16
CISPES (Committee in Solidarity) v. FBI, 770 F.2d 468 (5th Cir. 1985) 14
Citizens Against Rent Control v. Berkley, 454 U.S. 290 (1981) 19
Coates v. Cincinnati, 402 U.S. 611 (1971) 17, 19
Cohen v. California, 403 U.S. 15 (1971) 9
Grayned v. Rockford, 408 U.S. 104 (1972) 17
Jeannette Rankin Brigade v. Chief of Capitol Police, 342 F. Supp. 575 (D.D.C.), *aff'd*, 409 U.S. 972 (1972) 12, 19
Jewish Defense League, Inc. v. Washington, 347 F. Supp. 1300 (D.D.C. 1972) 16
Lipkin v. United States (D.C. App. Nos. 86-190 to 86-198) 18
Members of the City Council of Los Angeles v. Taxpayers for Vincent, —— U.S. ——, 104 S. Ct. 2118 (1984) 8
NAACP v. Alabama, 357 U.S. 449 (1958) 19
Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) 9, 10
Police Department v. Mosley, 408 U.S. 92 (1972) .. 15, 16
Regan v. Time, 468 U.S. 641 (1984) 10
Reid v. Covert, 354 U.S. 1 (1957) 11
Schacht v. United States, 398 U.S. 58 (1970) 12
Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) 19
Smith v. Goguen, 415 U.S. 566 (1974) 17
Strinko v. United States (D.C. App. No. 85-1330) .. 18
Thornhill v. Alabama, 310 U.S. 88 (1940) 16-17
United States v. Grace, 461 U.S. 171 (1983) 9, 10, 12
U.S. Postal Service v. Counsel of Greenberg Civic Ass'n, 453 U.S. 114 (1981) 9
Watts v. United States, 394 U.S. 705 (1969) 11

TABLE OF AUTHORITIES—Continued

Statutes: Page

18 U.S.C. § 112 ..... 3-5, 13, 14
§ 112(a) 3, 13
§ 112(b)(1) 13
§ 112(b)(2) 13
28 U.S.C. § 1254(1) 2
§ 1331 6
§ 1343 6
28 U.S.C. § 2403(a) 7
D.C. Code § 22-1115 ..... *passim*
§ 22-1116 ..... 2, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-

MICHAEL BOOS, J. MICHAEL WALLER and
BRIDGET BROOKER,
Petitioners,

v.

MARION S. BARRY, JR., MAURICE T. TURNER,
THE DISTRICT OF COLUMBIA and
FATHER R. DAVID FINZER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Michael Boos, J. Michael Waller and Bridget Brooker petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. 1a-102a) is reported at —— U.S. App. D.C. ——, 798 F.2d 1450 (1986). The opinion of the United States District Court for the District of Columbia (App. 105a-110a) is unreported.

JURISDICTION

The judgment of the Court of Appeals (App. 103a-104a) was entered on August 19, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

D.C. Code § 22-1115 provides:

> **§ 22-1115. Interference with foreign diplomatic and consular offices, officers, and property—Prohibited.**
>
> It shall be unlawful to display any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party, or organization, or any officer or officers thereof, or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government, party, or organization, or to intimidate, coerce, harass, or bring into public disrepute any officer or officers or diplomatic or consular representatives of any foreign government, or to interfere with the free and safe pursuit of the duties of any diplomatic or consular representatives of any foreign government, within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, or for other official purposes, except by, and in accordance with, a permit issued by the Chief of Police of the said District; or to congregate within 500 feet of any such building or premises, and refuse to disperse after having been ordered so to do by the police authorities of the said District. (Feb. 15, 1938, 52 Stat. 30, ch. 29, § 1; 1973 Ed., § 22-1115.)

D.C. Code § 22-1116 provides:

> **§ 22-1116. Same—Penalties; exception.**
>
> The Superior Court of the District of Columbia shall have jurisdiction of offenses committed in violation of § 22-1115, and any person convicted of violating any of the provisions of said section shall be punished by a fine not exceeding $100 or by imprisonment not exceeding 60 days, or both: Provided, however, that nothing contained in said section shall be construed to prohibit picketing, as a result of bona fide labor disputes regarding the alteration, repair, or construction of either buildings or premises occupied, for business purposes, wholly or in part, by representatives of foreign governments. (Feb. 15, 1938, 52 Stat. 30, ch. 29; § 2; Apr. 1, 1942, 56 Stat. 190, ch. 207, § 1; July 8, 1963, 77 Stat. 77, Pub. L. 88-60, § 1; July 29, 1970, 84 Stat. 570, Pub. L. 91-358, title I, § 155(a); 1973 Ed., § 22-1116.)

18 U.S.C. § 112 provides:

> **§ 112. Protection of foreign officials, official guests, and internationally protected persons**
>
> (a) Whoever assaults, strikes, wounds, imprisons, or offers violence to a foreign official, official guest, or internationally protected person or makes any other violent attack upon the person or liberty of such person, or, if likely to endanger his person or liberty, makes a violent attack upon his official premises, private accommodation, or means of transport, or attempts to commit any of the foregoing shall be fined not more than $5,000 or imprisoned not more than three years, or both. Whoever in the commission of any such act uses a deadly or dangerous weapon shall be fined not more than $10,000 or imprisoned not more than ten years, or both.
>
> (b) Whoever willfully—
>
> (1) intimidates, coerces, threatens, or harasses a foreign official or an official guest or obstructs a foreign official in the performance of his duties;
>
> (2) attempts to intimidate, coerce, threaten, or harass a foreign official or an official guest

or obstruct a foreign official in the performance of his duties; or

(3) within the United States but outside the District of Columbia and within one hundred feet of any building or premises in whole or in part owned, used, or occupied for official business or for diplomatic, consular, or residential purposes by—

(A) a foreign government, including such use as a mission to an international organization;

(B) an international organization;

(C) a foreign official; or

(D) an official guest;

congregates with two or more other persons with intent to violate any other provision of this section;

shall be fined not more than $500 or imprisoned not more than six months, or both.

(c) For the purpose of this section "foreign government", "foreign official", "internationally protected person", "international organization", and "official guest" shall have the same meanings as those provided in section 1116(b) of this title.

(d) Nothing contained in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the first amendment to the Constitution of the United States.

(e) If the victim of an offense under subsection (a) is an internationally protected person, the United States may exercise jurisdiction over the offense if the alleged offender is present within the United States, irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender. As used in this subsection, the United States includes all areas under the

jurisdiction of the United States including any of the places within the provisions of sections 5 and 7 of this title and section 101(38) of the Federal Aviation Act of 1958, asamended (49 U.S.C. 1301 (38)).

(f) In the course of enforcement of subsection (a) and any other sections prohibiting a conspiracy or attempt to violate subsection (a), the Attorney General may request assistance from any Federal, State, or local agency, including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary, notwithstanding.

(As amended Oct. 24, 1972, Pub. L. 92-539, Title III, § 301, 86 Stat. 1072; Oct. 8, 1976, Pub. L. 94-467, § 5, 90 Stat. 1999; Nov. 9, 1977, Pub.L. 95-163, § 17(b)(1), 91 Stat. 1286; Oct. 24, 1978, Pub. L. 95-504, § 2(b), 92 Stat. 1705.)

STATEMENT OF THE CASE

Petitioners are three young conservatives with an active interest in political issues who wish to display signs critical of foreign governments on the public streets and sidewalks of the District of Columbia within 500 feet of the official buildings of those governments. Petitioners wish to diplay signs stating "SOLIDARITY" or "RELEASE SAKHAROV" near the Soviet Embassy and signs stating "STOP THE KILLING" near the Nicaraguan Embassy. Each petitioner also wishes to congregate peacefully, with two or more other persons, on public streets or sidewalks within 500 feet of official foreign buildings.

Petitioners wish only to engage in a peaceful expression of views, and only on those District of Columbia streets and sidewalks open to the public. Petitioners have no desire to engage in any violence; to threaten, harass, intimidate or interfere with any foreign official; or to demonstrate on the private property of any foreign

government. Petitioners are inhibited from peacefully picketing or congregating because of the threat of arrest or prosecution under D.C. Code § 22-1115.

Section 22-1115 has two clauses. The first clause prohibits the display of signs or banners designed to bring a foreign government into "public disrepute" or "public odium" anywhere within 500 feet of its official buildings. The second prohibits individuals from congregating within the 500 foot area after having been ordered by the police to disperse.

Petitioners instituted an action in the district court seeking an injunction against enforcement of § 22-1115, and a declaration that the statute was unconstitutional and otherwise unlawful. The district court had jurisdiction under 28 U.S.C. §§ 1343 and 1331. The district court entered summary judgment for respondents, concluding that the statute was in all respects constitutional (App. 105a-110a).

The court of appeals affirmed (App. 1a-54a), over a vigorous dissent (App. 55a-102a). The court of appeals recognized that the first clause of § 22-1115 proscribed only speech (*i.e.*, the display of a picket sign) and not conduct (App. 53a), and that the purpose of the statute was to prohibit only those demonstrations which a foreign government considered insulting or annoying (App. 13a). However, it interpreted Congress' power under Article I, Section 8, of the Constitution to "define and punish . . . Offences against the Law of Nations" as empowering Congress to legislate as necessary to bring the United States into compliance with rules governing the international community (App. 9a). In particular, the lower court concluded that protecting foreign officials from speech they found insulting or offensive was a central component of the law of nations, and a compelling governmental interest which Congress could act to enforce pursuant to Article I, Section 8 (App. 16a).

The court also concluded that the statute was necessary to fulfill our obligations under "customary international law" and a treaty (App. 18a), and that the First Amendment must be read in harmony with these fundamental principles of international law. Relying heavily upon its interpretation of Article 1, Section 8, the court below rejected petitioners' challenges that § 22-1115 violates the First Amendment because it is viewpoint discriminatory (App. 35a-36a), it is content based (App. 36a-38a), it is not narrowly tailored to further a compelling governmental interest (App. 48a-51a), and it fails to leave open ample alternative channels of communication. The court affirmed the district court's rejection of petitioners' argument that the statute, read with its counterpart, violates equal protection because it allows insulting demonstrations by parties involved in labor disputes, but not others (App. 48a, n.19). It also rejected petitioners' contention that the statute was unconstitutionally vague (App. 39a-40a), and unconstitutionally overbroad (App. 44a-48a). Finally, the lower court interpreted the second clause of the statute as applicable whenever the police reasonably believe that a threat to the security or peace of the embassy is present and ruled that, so interpreted, the second clause suffers no constitutional infirmities (App. 40a-43a).[1]

REASONS FOR GRANTING THE WRIT

The court of appeals has decided several important questions of constitutional law. Its First Amendment and Equal Protection rulings conflict with numerous recent decisions of the Court which make clear that restrictions on free speech in public forums cannot stand unless they are, *inter alia*, viewpoint neutral, content neutral and narrowly tailored. The court of appeals' decision interprets Congress' Article I power to punish offenses against

[1] 28 U.S.C. § 2403(a) may be applicable. The United States participated as *amicus curiae* in the district court and the court of appeals.

the laws of nations—a power which, so far as we can determine, has never been interpreted by this Court in any decision—in a unique and far reaching way. Under the decision below, "customary international law" is incorporated wholesale as a limitation upon first amendment freedoms, and our government's supposed interest in insulating foreign governments from peaceful free speech which displeases them (but not speech they support) overrides the rights of Americans to speak freely. The ruling below is sufficiently extreme that it requires the conclusion that our government is routinely violating fundamental principles of international law everywhere in the United States but the District of Columbia. The decision below also reaches conclusions inconsistent with those reached in a recent decision of the Fifth Circuit.

I. THE DECISION BELOW RESOLVES SEVERAL IMPORTANT FIRST AMENDMENT ISSUES IN CONFLICT WITH DECISIONS OF THIS COURT, AND HAS GIVEN AN ERRONEOUS AND FAR REACHING INTERPRETATION TO ARTICLE I, SECTION 8, WHICH MERITS REVIEW.

A. Section 22-1115 does not prohibit violence, intimidation, or threats against foreign persons or property. Instead, as the court below recognized, the statute applies only when a demonstrator displays a sign or banner (App. 53a), and only when the message on that sign is designed to bring a foreign government into "public disrepute" or "public odium". Thus, under this statute petitioners are free to display in front of the Soviet Embassy a sign which states "WE SUPPORT GORBACHOV", but commit a crime if the sign states "WE SUPPORT SAKHAROV" or other dissidents.

The First Amendment does not allow the government to discriminate based upon viewpoint. The Court recently reiterated this principle in *Members of the City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 2128 (1984):

> "As *Stromberg* [*Stromberg* v. *California*, 283 U.S. 359 (1931)] and *Lovell* [*Lovell* v. *Griffin*, 303 U.S. 444 (1938)] demonstrate, there are some purported interests—such as a desire to . . . exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate that they would immediately invalidate the rule. The general principle that has emerged from this line of cases is that the First Amendment forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others. See *Bolger* v. *Youngs Products Corp.*, 463 U.S. 60, 64-65 (1983); *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 455, 462-463 (1980); *Young* v. *American Mini Theatres*, 427 U.S. 50, 63-65, 67-68 (1976) (plurality opinion); *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95-96 (1972)."

Accord, e.g., Perry Education Ass'n v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983) (state "may not pick and choose" between different views); *Cohen* v. *California*, 403 U.S. 15, 18 (1971) (state cannot punish "for the underlying content of the messages . . ."). The ruling below conflicts with these decisions.

B. Petitioners wish to demonstrate only on those District of Columbia streets and sidewalks open to the public. Streets and sidewalks "are considered, without more, to be 'public forums' ". *United States* v. *Grace*, 461 U.S. 171, 176-177 (1983). *Accord, U.S. Postal Service* v. *Counsel of Greenberg Civic Ass'n*, 453 U.S. 114, 133 (1981). As explained in *United States* v. *Grace*, 461 U.S. 171, 177, 103 S.Ct. at 1707 (1983):

> "In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner of regulations as long as the regulations 'are content-neutral, are narrowly tailored to serve a significant government interest and leave open

ample alternative channels of communication'" (quoting *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

See, e.g., Regan v. *Time*, 468 U.S. 641 (1984).

D.C. Code § 22-1115 violates the First Amendment because it meets none of these requirements. The statute is not content-neutral, as the court below recognized. The statute is not narrowly tailored and serves no legitimate governmental interest. The statute bans the use of *all* signs critical of foreign governments any place within 500 feet of its foreign buildings, and even prohibits a solitary citizen from peacefully displaying a sign reading "SOLIDARITY" up to 499 feet from the Soviet Embassy. And, while our government undoubtedly has a strong interest in protecting foreign officials from violence or intimidation, it has no legitimate interest in insulating them from peaceful free speech which displeases them. The statute fails to leave open ample alternative channels of communication because it bans peaceful demonstrators anywhere within 500 feet of a foreign building—a distance of almost two football fields. The statute is therefore unconstitutional for each of these additional reasons.

C. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." Peaceful picketing is an "expressive activit[y] involving speech protected by the First Amendment." *Grace*, *supra*, 461 U.S. at 176. Article I, Section 8, gives Congress power to define and punish "Offences against the Law of Nations". The court below ruled that Congress could pass a law "abridging the freedom of speech" anywhere within 500 feet of a foreign government's building, because it discerned an intention of the framers of Article I, Section 8, that Congress had an obligation to enforce principles of international law, including especially the principle that diplomats are entitled to protection from free speech they find insulting. According to the court below, the government's interest in insulating foreigners from offensive free speech was not only a legitimate interest, but a compelling one, which justified limitations upon First Amendment freedoms which ordinarily would not be tolerated. This reading of Article I, Section 8, is sufficiently novel, far reaching, and important as to warrant review by this Court.

1. In *Reid* v. *Covert*, 354 U.S. 1, 16 (1957), the Court rejected a governmental argument that incursions upon Bill of Rights protections could be justified as necessary and proper to carry out the government's obligations under international agreements:

> "The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress . . . which is free from the restraints of the Constitution."

The Court further explained that it:

> "would be manifestly contrary to the objectives of those . . . responsible for the Bill of Rights . . . to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions" (*id.* at 17).

Reid held that the full panoply of Fifth and Sixth Amendment rights were available to Americans tried overseas by military courts, notwithstanding any contrary treaties which are, under Article VI, the "supreme Law of the Land;" *id.* at 18-19. The core holdings of the court of appeals cannot be reconciled with *Reid*.

2. "The nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive . . .", *Watts* v. *United States*, 394 U.S. 705, 707 (1969), and also members of the legislative and judicial branches. Yet the First Amendment allows protestors to peacefully display picket signs on the public sidewalks in front of the official building of each of the

three branches. *E.g.*, *United States* v. *Grace*, *supra*, and *Jeannette Rankin Brigade* v. *Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C.), *aff'd*, 409 U.S. 972 (1972). Under the decision below, the United States government has an obligation under international law to provide a level of insularity from free expression to countless foreign officials from around the world which it is constitutionally incapable of providing its own highest ranking officials. This apparent anomoly warrants the consideration of this Court.

Further, the lower court's view that the framers of Article I, Section 8, intended to insulate all foreign ambassadors from insulting free speech merits review. It seems most doubtful that the founding fathers, fresh from declaring independence and a revolutionary war, intended to foreclose the public from freely expressing the kinds of offensive views about foreign governments which they had been expressing themselves, including in the Declaration of Independence.

3. *Schacht* v. *United States*, 398 U.S. 58 (1970), involved criticism of the armed forces while we were engaged in combat overseas. The Court held (*id.* at 63):

> "Schacht was free to participate in any skit at the demonstration that praised the army, but under the final clause § 772(f) he could be convicted of a federal offense if his portrayal attacked the army instead of praising it . . . . The final clause of § 772 (f), which leave Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment." [2]

Thus, not even the War Power, which is perhaps the greatest power of all, allows Congress to punish offensive speech while permitting praiseworthy speech. Yet the decision below interprets the power to punish offenses

[2] The Court was unanimous on this point. See 398 U.S. at 65, 69.

against the laws of nations as permitting precisely that result.

4. In 1972, Congress enacted 18 U.S.C. § 112 in order to implement the obligations of the United States under the Vienna Convention of 1961. 18 U.S.C. § 112(a) and (b)(1)-(2) apply everywhere in the United States, including the District of Columbia. That statute makes criminal only acts of violence (§ 112(a)) or an actual or attempted act which "intimidates, coerces, threatens, or harasses a foreign official" (§ 112(b)(1)-(2)). The statute does not prohibit peaceful demonstrations against foreign officials; indeed, it was amended by Congress in 1976 to eliminate any prohibition on the display of banners or signs, because of Congressional concern that that prohibition violated the First Amendment. 1976 U.S. Code Cong. & Ad. News at 4484 and n.9. Under 18 U.S.C. § 112, petitioners can display their protest signs on the public streets and sidewalks in front of official foreign buildings anywhere in the United States outside of the District of Columbia.

In rejecting petitioner's constitutional challenges to D.C. Code § 22-1115, the court below concluded (App. 24a-26a) that that statute provides only the minimal protection against offensive free speech to which foreign officials are entitled under international law. That conclusion cannot be reconciled with the carefully considered Congressional determination that no such protection is necessary or desirable anywhere in the fifty states, including New York where the United Nations sits. Indeed, if the conclusion reached below is correct, it necessarily follows that the United States is violating international law in each of the 50 states outside the District of Columbia where 18 U.S.C. § 112 does not prohibit individuals from displaying insulting signs on the public streets and sidewalks in front of official foreign building. This extraordinary result warrants review by the Court.

5. The Fifth Circuit construed 18 U.S.C. § 112 in *CISPES (Committee in Solidarity)* v. *FBI*, 770 F.2d 468 (5th Cir. 1985). Former Chief Judge John R. Brown stated (*id.* at 474):

> "[T]he statute does not on its face prohibit peaceful demonstrations . . . . It merely proscribes actions of a threatening or intimidating nature directed at any protected official, and First Amendment rights are affected only to the extent that their exercise might serve to create such intimidation, etc."

The Fifth Circuit concluded the statute "achieves a nice, and permissible, balance between freedom of expression and the important governmental interest which exists here." *Id.* at 478. Therefore, in the Fifth Circuit, peaceful picketing directed against foreign governments on the streets and sidewalks in front of their official buildings is not prohibited by 18 U.S.C. § 112, but instead is deemed constitutionally protected.

The court below, construing the far broader provisions of D.C. Code § 22-1115, stated (App. 24a):

> "It is impossible for us to see how the compelling interest at stake could be served with a regulation that had any significantly smaller impact upon speech."

It also believed that allowing protests and demonstrations up to the gate of an embassy would violate our international obligations (App. 25a-26a). Either the Fifth Circuit or the District of Columbia Circuit is mistaken, and the decision below decides important questions about the scope of Article I, Section 8, and its relationship to the First Amendment, which have not been, but should be, settled by the Court.

II. WHETHER THE STATUTE VIOLATES EQUAL PROTECTION BY ALLOWING PARTIES TO LABOR DISPUTES TO PARTICIPATE IN DEMONSTRATIONS INSULTING TO FOREIGN OFFICIALS IS LIKEWISE OF PUBLIC IMPORTANCE APPROPRIATE FOR CONSIDERATION BY THE COURT.

Although § 22-1116 makes it a crime to display insulting signs within 500 feet of a foreign building, D.C. Code 22-1116, the companion provision to § 22-1115, pertinently provides:

> "[N]othing contained in [Section 22-1115] shall be construed to prohibit picketing, as a result of bona fide labor disputes regarding the alteration, repair, or construction of either buildings or premises occupied . . . by . . . foreign governments."

Thus, while the statute blankets all other picketing which insults or offends a foreign government, it exempts all such picketing resulting from specified labor disputes.

Police Department of Chicago v. *Mosley*, 408 U.S. 92 (1972), involved a Chicago ordinance which prohibited picketing within 150 feet of a school building during school hours, but which excepted peaceful picketing of any school involved in a labor dispute. The Court held that the statute violated equal protection. 408 U.S. at 96, 100. *Cary* v. *Brown*, 447 U.S. 455 (1980), involved an Illinois statute which prohibited the picketing of residences and dwellings, but which contained an exception for, *inter alia*, "the peaceful picketing of a place of employment involved in a labor dispute." The Court found this statute to be "constitutionally indistinguishable from the ordinance invalidated in *Mosley*", 447 U.S. at 460, and held that it too violated equal protection.

The Court of Appeals rejected petitioners equal protection argument, relying solely (App. 48a, n. 19) upon

Jewish Defense League v. *Washington*, 347 F. Supp. 1300 (D.D.C. 1972) ("*J.D.L.*"). *J.D.L.*, decided after *Mosley* but before *Carey*, attempted to distinguish *Mosely* on the ground that the government's interest in protecting diplomats was of a "higher quantum" than protecting school children from disruption (347 F. Supp. at 1301). But in *Carey*, decided after *J.D.L.*, the Court rejected this precise type of argument. 447 U.S. at 464-465, 471.

There is no principled difference between the statute involved here, and those invalidated in *Mosely* and *Carey*. Especially in light of the court of appeals' conclusion that protecting foreign officials from insulting free speech is a compelling governmental interest, it is extremely difficult to understand how Congress could rationally conclude that individuals involved in labor disputes may utter precisely such insulting speech with impunity. Further, it is difficult to believe that there exists any recognized principle of international law under which foreign officials are generally entitled to protection from offensive free speech by most citizens of the host state, but not from those citizens who are involved in labor disputes or otherwise have enough political clout to gain exempted status from the legislature.

III. THE DECISION BELOW ERRONEOUSLY CONCLUDED THAT THE STATUTE IS NOT UNCONSTITUTIONALLY OVERBROAD AND VAGUE. ITS DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND DESERVES REVIEW.

A. A law is unconstitutional on its face if it "does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech . . . ." *Thornhill* v. *Alabama*, 310 U.S. 88, 97 (1940). *See* cases cited in *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612-13 (1973). If petitioners can show that a law's overbreadth is real and substantial, "judged in relation to the statute's plainly legitimate sweep," *Broadrick*, 413 U.S. at 615, they can challenge a statute's prohibitions not only as applied to them, but also as it might be applied to "others not before the court . . ." (*id.* at 612).

Judged by these standards, § 22-1115 is unconstitutionally overbroad. On the one hand, the statute does not aim specifically at prohibiting legitimate evils. It does not prohibit individuals armed with machine guns or baseball bats from attacking an embassy. But it does prohibit anyone from displaying an offensive picket sign anywhere on public or private property within 500 feet of the perimeter of an embassy. It also prohibits the union whose building faces the Soviet Embassy across 16th Street, N.W., from posting "SOLIDARITY" signs on its own private property. Unlike most other picketing statutes, which usually apply a limitation of about 100 feet, this statute's prohibitions extend for a distance of almost two football fields.

B. The void for vagueness doctrine "demands a greater degree of specificity" in the context of the First Amendment than in other areas. *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974). Overly vague statutes fail to give reasonable notice of what is prohibited, needlessly inhibit the exercise of free speech rights, and most important, are susceptible to arbitrary and discriminatory law enforcement. *Grayned* v. *Rockford*, 408 U.S. 104, 108-109 (1972). The Court has invalidated on vagueness grounds a statute prohibiting people from conducting themselves in a manner "*annoying* to persons passing by", *Coates* v. *Cincinnati*, 402 U.S. 611, 612 (1971) (emphasis added).

The terms "public disrepute" and "public odium" are inherently vague, and make this statute as infirm as the one invalidated in *Coates*. For example, is a person who

displays a "STOP THE KILLING" sign in front of the Nicaraguan Embassy demonstrating against the Nicaraguan government or the contras. More importantly, the statute is being enforced arbitrarily and discriminatorily by respondents. Respondents have accommodated thousands of black and liberal demonstrators at the South African Embassy by waiting to arrest them until after media crews arrive to cover the event; and the United States Attorney has not prosecuted any South African demonstrators under § 22-1115 (App. 50a, n. 21). Respondents' highest ranking legal officer admits that no "significant District of Columbia interest would be served by" prosecuting South African demonstrators (*id.*). By contrast, respondents assert a compelling interest in prosecuting peaceful demonstrators who protest Soviet acts of genocide in Afghanistan. Conservatives or Rabbis who demonstrate within 500 feet of the Soviet Embassy are promptly arrested, and then vigorously prosecuted by the United States Attorney under Section 22-1115.[3]

IV. WHETHER THE SECOND CLAUSE OF THE STATUTE, WHICH ALLOWS THE POLICE TO DISPERSE CONGREGATIONS AT THEIR WHIM, IS UNCONSTITUTIONAL ALSO WARRANTS REVIEW.

Points I to III above address the first clause of the statute which prohibits the display by individuals of signs. The second clause of § 22-1115, which immediately follows the semicolon in the statute, makes it unlawful:

> "... to congregate within 500 feet of any such building or premises, and refuse to disperse after having been ordered so to do by the police authorities of the said District."

[3] Several prosecutions under the statute against conservatives or Rabbis who have attempted to demonstrate against the Soviet Union are currently pending in the District of Columbia courts. *E.g.*, *Strinko* v. *United States* (D.C. App. No. 85-1330), and *Lipkin* v. *United States* (D.C. App. Nos. 86-190 to 86-198).

That is all the second clause provides. It imposes no express limitations upon the dispersal power of the police.

The right to congregate is synonymous with the First Amendment's guarantee of the "right of the people peaceably to assemble." *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958). "The First Amendment protects political association as well as political expression." *Buckley* v. *Valeo*, 424 U.S. 1, 15 (1976). *Accord*, *Citizens Against Rent Control* v. *Berkley*, 454 U.S. 290 (1981).

The court of appeals read the dispersal power in the second clause as limited to circumstances "when the police reasonably believe that a threat to the security or peace of the embassy is present" (App. 43a). Since the statute is quite clear on its face and provides no such limitation, and since the purpose of the statute was to prohibit insulting or annoying demonstrations and not violence (App. 13a), this attempted rewrite of the statute was unjustified. *Jeannette Rankin Brigade* v. *Chief of Capitol Police*, 342 F. Supp. 575, 585-588 (D.D.C.), *aff'd*, 409 U.S. 972 (1972).

In any event, the statute remains unconstitutional even as construed by the court of appeals. In *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 149-150 (1969), the Court rejected as unconstitutional an ordinance which permitted the city to deny demonstration permits when "in its judgment the public welfare, peace, safety, health, decency, good order, morals, or convenience require that it be refused". *Id.* Similarly, in *Coates* v. *Cincinnati*, *supra*, 402 U.S. at 615-616, the Court invalidated an ordinance prohibiting congregations which were "annoying" to passersby. The second clause of § 22-1115 is no less standardless, and no less infirm, than the statutes invalidated in *Shuttlesworth* and *Coates*.

CONCLUSION

It is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

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86-803

No. 86-

IN THE
Supreme Court of The United States
OCTOBER TERM, 1986

MICHAEL BOOS, J. MICHAEL WALLER and
BRIDGET BROOKER,
Petitioners,

v.

MARION S. BARRY, JR., MAURICE T. TURNER,
the DISTRICT OF COLUMBIA and
FATHER R. DAVID FINZER,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
Opinion, dated August 19, 1986 . .	1a
Judgment, dated August 19, 1986 . .	103a
Memorandum-Order, dated May 17, 1984	105a

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5327

R. DAVID FINZER, FATHER, et al., APPELLANTS

v.

MARION S. BARRY, JR., MAYOR,
DISTRICT OF COLUMBIA, et al.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 84-0899)

Argued March 20, 1985

Decided August 19, 1986

Raymond D. Battocchi, with whom *Alfred F. Belcuore*, *James A. Bensfield* and *Steven F. Korostoff* were on the brief for appellants.

William J. Earl, Assistant Corporation Counsel for the District of Columbia, with whom *John H. Suda*, Principal

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Deputy Corporation Counsel for the District of Columbia and *Charles L. Reischel*, Deputy Corporation Counsel for the District of Columbia were on the brief for appellees.

R. Craig Lawrence, Assistant United States Attorney, with whom *Joseph E. diGenova*, United States Attorney, and *Royce C. Lamberth*, Assistant United States Attorney, were on the brief for the United States *amicus curiae* urging affirmance.

Before: WALD, *Chief Judge*, BORK, *Circuit Judge*, and DAVIS,* *Circuit Judge*, United States Court of Appeals for the Federal Circuit.

Opinion for the Court filed by *Circuit Judge* BORK.

Dissenting opinion filed by *Chief Judge* WALD.

BORK, *Circuit Judge*: Appellants are individuals who wish to carry placards opposing the policies of the Soviet and Nicaraguan governments in front of those governments' embassies, located within the District of Columbia. In the absence of a permit, such protests are barred by D.C. Code § 22-1115 (1981). That same statute authorizes police to disperse congregations in front of embassies. Appellants asserted unsuccessfully before the district court that, on its face, this law violates the first and fourteenth amendments to the Constitution. They appeal the district court's holding that the statute is constitutional and its grant of summary judgment for defendants.

The challenged statute regulates demonstrations taking place in front of foreign embassies (or buildings occupied by representatives of foreign governments) located within the District of Columbia. It contains several subsidiary provisions but for purposes of exposition it is sufficient to note its two primary features. The first makes it unlawful to "display any . . . placard . . . designed

* Sitting by designation pursuant to 28 U.S.C. § 291(a).

. . . to . . . bring into public odium any foreign government . . . or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government" within 500 feet of that country's embassy, unless the demonstrators receive a permit to do so from the Chief of Police. The second feature makes it unlawful to "congregate within five hundred feet of any [embassy], and refuse to disperse after having been ordered so to do by the police authorities" of the District of Columbia.[1]

Speaking very generally, the first part of the statute—requiring a permit for the display of a sign tending to bring a foreign government into disrepute—is primarily intended to avoid affronts to the dignity of foreign governments and their diplomatic personnel. The second feature—prohibiting "congregating"—is concerned more with threats to the security of the foreign government's

[1] The full text of D.C. Code § 22-1115 (1981) reads as follows:

> It shall be unlawful to display any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party, or organization, or any officer or officers thereof, or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government, party, or organization, or to intimidate, coerce, harass, or bring into public disrepute any officer or officers or diplomatic or consular representatives of any foreign government, or to interfere with the free and safe pursuit of the duties of any diplomatic or consular representatives of any foreign government, within five hundred feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, or for other official purposes, except by, and in accordance with, a permit issued by the Chief of Police of the said District; or to congregate within five hundred feet of any such building or premises, and refuse to disperse after having been ordered so to do by the police authorities of the said District.

representatives and property. Each of these main divisions of the statute is, of course, capable of serving both purposes mentioned. In both cases, the protection is limited to an area extending 500 feet from the building. In *Frend* v. *United States*, 100 F.2d 691 (D.C. Cir. 1938), *cert. denied*, 306 U.S. 640 (1939), this court rejected a first amendment challenge to section 22-1115 and upheld the provision's constitutionality. In issuing the judgment we review today, the district court, relying in part on *Frend*, reached the same conclusion. *Finzer* v. *Barry*, Civ. Action No. 84-0899 (D.D.C. May 17, 1984), Record Excerpts ("R.E.") at 62.

Our opinion is, unfortunately, quite lengthy, because in addition to presenting our analysis, it is necessary that we address the numerous and varied challenges to this statute advanced by appellants and the dissent. We hold that section 22-1115 passes constitutional muster, and we affirm the district court's holding to that effect. We remand, however, for the limited purpose of addressing appellants' claim that section 22-1115 has been enforced by local authorities against persons who were not in fact engaged in activities forbidden by the statute.

I.

Father R. David Finzer is the National Chairman of the Young Conservative Alliance of America, Inc., which he describes as "an organization of younger citizens who hold conservative views, and are dedicated to advocating and furthering those viewpoints." Declaration of Father R. David Finzer, R.E. at 15. He and three co-plaintiffs—Bridget Brooker, J. Michael Waller, and Michael Boos—initiated this action in March of 1984 against the District of Columbia, the Mayor, and the Chief of Police. The United States was granted leave to participate as *amicus curiae* and supported the constitutionality of the statute.

Plaintiffs' complaint and accompanying declarations state that they wish to conduct demonstrations of the sort described in D.C. Code § 22-1115—they wish to carry signs critical of the Soviet and Nicaraguan governments within 500 feet of their embassies. Mr. Waller, for example, wishes to carry a sign bearing the words "Stop the Killing" in front of the Nicaraguan Embassy. Two of the plaintiffs claim to have been prevented in the past from demonstrating by uniformed police officers acting under the authority of section 22-1115. Additionally, they allege that the statute has been enforced against activity that was not in fact within its reach. Arguing that section 22-1115 abridges rights guaranteed by the first and fourteenth amendments to the United States Constitution, plaintiffs moved for summary judgment, seeking a permanent injunction against the provision's enforcement and a declaration of its unconstitutionality.

Defendants opposed this motion and filed a cross motion for summary judgment. They filed accompanying declarations from David Fields, Deputy Assistant Secretary of State for Security; Thomas D. Quinn, Special Agent in Charge of the Office of Protective Operations of the United States Secret Service; James E. Nolan, Jr., Director of the Office of Foreign Missions, Department of State; and John C. Connor, Deputy Chief of Police and Commanding Officer of the Special Operations Division of the Metropolitan Police Department in the District of Columbia. The declarations of the two State Department officials noted that the responsibility of a host state to provide appropriate protection to foreign embassies within its borders is one codified and imposed by international law, and that the degree of protection afforded by foreign governments to American diplomatic personnel abroad depends in significant part upon the protection provided by our government to foreign diplomats living in Washington, D.C. It was the considered judgment of both men that diminishing the protection

provided by section 22-1115 would have a serious and adverse effect upon the relationships between the United States and many other governments and would endanger American diplomatic personnel who live and work in other countries. The other two declarants stated, on the basis of their professional experience, that section 22-1115 was necessary to the continued security of foreign embassies located in Washington, D.C. They explained that the task of protecting foreign embassies presented unique security problems, because—unlike, for example, when protecting the White House, the Capitol, or the Supreme Court—American police are prohibited from entering the premises. They may do so only upon the express prior approval of the foreign government, which, for obvious reasons, will rarely be given. The 500 foot buffer zone created by section 22-1115 compensates to some degree for the absence of any American police presence inside these buildings. R.E. at 36-58.

The plaintiffs did not submit any declarations in response. Instead, they filed a Statement of Material Facts in Dispute in which they claimed that they were entitled to summary judgment even if all the defendants' declarations were accepted as true, and informed the district court that they did not wish to seek discovery at the time with respect to the factual contentions made in those declarations. R.E. at 59.

In a Memorandum Order issued on May 17, 1984, Judge Gasch granted defendants' motion for summary judgment. He held section 22-1115 to be "necessary for the protection of the personnel and property of foreign governments located in Washington, D.C." *Finzer* v. *Barry*, Civ. Action No. 84-0899, mem. op. at 3, R.E. at 64. He found that the statute served to fulfill American obligations under international law and to protect our representatives abroad, noting that "[f]ew government interests are more compelling." *Id.* Judge Gasch held therefore that the statute withstood the scrutiny required

by the equal protection clause and relied upon the authority of *Frend* in rejecting the first amendment challenges.

II.

The appellants in *Frend* v. *United States* had been convicted of violating section 22-1115 by demonstrating in front of the Austrian and German embassies. Finding that there was no question that their activities ran afoul of the statute, the *Frend* court proceeded to examine the statute's constitutionality.

The court noted that section 22-1115 was enacted as an exercise of Congress' constitutionally vested authority to "define and punish . . . Offenses against the Law of Nations," U.S. Const. art 1, § 8, cl. 10, its purpose being to fulfill the United States' duty under international law "of protecting the residence of an ambassador or minister against invasion as well as against any other act tending to disturb the peace or dignity of the mission or of the member of a mission." 100 F.2d at 692, 693. Limited as the statute was to "public demonstrations calculated to arouse passions and resentments in those governments with which we have official relations," this court held that section 22-1115 was a legitimate and constitutional exercise of congressional authority. *Id.* at 693.

Although *Frend* is persuasive precedent, we cannot decide this case simply by citing it as the binding law of the circuit. The case was decided almost a half century ago and in the interval the Supreme Court has developed constitutional law in ways that must be taken into account. Appellants challenge section 22-1115 in part on the basis of a hybrid of equal protection and first amendment law that became part of the doctrinal landscape several decades after *Frend*. Indeed, much of modern first amendment law took shape after *Frend* was decided. We are compelled, therefore, to reexamine *Frend* in light of intervening precedent. Upon review, we find much of

its analysis still convincing, and the basic holding fully consistent with the constitutional standards that have evolved.[2]

III.

Though it will be necessary in the course of this opinion to meet the multiple charges levelled by appellants and by the dissent upon this minor regulation of demonstrations, the core of this case lies in the relationship between the United States' national interests and international obligations and the first amendment's guarantee of free speech. The question to be determined is whether section 22-1115 achieves a permissible accommodation between the competing claims of these profound constitutional values.

A.

Section 22-1115 was enacted pursuant to Congress' power, under article I, section 8 of the Constitution, "To define and punish . . . Offences against the Law of Nations." The need for such authority was, of course, one of the reasons a new constitution was desired, and the power was placed among the great powers granted the new government. Implementation of the law of nations by the American government was seen as crucial to the conduct of our foreign relations, a subject of pervasive concern in the Constitution. For that reason, the statute before us, though rooted in Congress' power to define and punish offenses against the law of nations, also draws sustenance from all those provisions of articles I and II that empower the national government, as a whole, to manage American intercourse with other nations.

In vesting Congress with the power to define, as well as to punish, offenses against the Law of Nations, article

[2] We note that the same conclusion has recently been reached by the Superior Court of the District of Columbia, which upheld § 22-1115 against precisely the same challenges presented here. United States v. Brown, No. M-10901-83 (D.C. Super. Ct. Jan. 20, 1984).

I, section 8 of the Constitution authorized Congress to derive from the often broadly phrased principles of international law a more precise code, as it determined that to be necessary to bring the United States into compliance with rules governing the international community. In enacting section 22-1115, Congress sought to guarantee to foreign diplomats, long understood as "objects of especial respect and protection," [3] the security to which they have always been entitled under legal doctrines accepted and enforced throughout the world. Since the days of Blackstone, "infringement of the rights of ambassadors" have been regarded as one of "the principal offenses against the law of nations." 4 W. Blackstone, *Commentaries* 68, and for as long as the United States has been a nation, those rights have been recognized to include those that are implicated here—protection from intimidation and the potential of violence, and from assaults on the dignity and peace of the embassy as well.

The principle that host states have a special responsibility to ensure that foreign embassies and the personnel inside them are free from threats of violence and intimidation is "solidly entrenched in the Law of Nations." 2 C. Hyde, *International Law* 1249 (1945). Vattel, one of the first to attempt to codify the Law of Nations, wrote in the eighteenth century that embassies

> being of such great importance in the universal society of nations, and so necessary to their common well-being, the persons of ministers charged with those embassies are to be held *sacred* and *inviolable* among all nations. . . . This safety is particularly due to the minister, from the sovereign to whom he is sent. To admit a minister, to acknowledge him in such character, is engaging to grant him the most particular protection, and that he shall enjoy all possible safety. It is true, indeed, that the sovereign is bound to protect every person within his dominions,

[3] President Fillmore, Message to Congress, Dec. 2, 1851, 6 J. Moore, *International Law Digest* 813 (1906).

> whether native or foreign, and to shelter him from violence: but this attention is in a higher degree due to a foreign minister.

Vattel, *The Law of Nations* 464-65 (1863) (emphasis in original). Vattel went on to note that while an act of violence done to a "private person" was an "ordinary transgression," which the sovereign of the country in which it occurred was free to pardon, a similar act against a foreign ambassador was "a crime of state, an offence against the law of nations," of which the power to pardon was vested in the sovereign "who has been offended in the person of his representative." *Id.* at 465. The need for special measures to ensure protection is thus a function of both the unique sensitivity of the position and the strength of feeling that may often be aroused against nations which, while perhaps in some respects adversarial to ours, are ones with which we need to maintain diplomatic channels of communication.

The duty to safeguard the peace and dignity of the embassy has equally strong roots. Vattel explained:

> The respect which is due to sovereigns should redound to their representatives, and especially their ambassadors, as representing their master's person in the first degree. Whoever offends and insults a public minister commits a crime the more deserving of severe punishment, as he might thereby involve his country and his sovereign in very severe difficulties and trouble.

Vattel, *supra*, at 463. Thus, the tearing down in Philadelphia in 1802 of the flag of the Spanish minister, "with the most aggravating insults," was considered actionable in the Pennsylvania courts as a violation of the law of nations. 4 J. Moore, *Digest of International Law* 627 (1906) (*quoting* letter from Secretary of State Madison to Governor McKean (May 11, 1802)). A complaint by the British government in 1794 concerning a "riot committed by a number of persons tumultuously assembled

before the house of a foreign consul, requiring him to deliver up certain persons supposed to be resident with him, and insulting him with improper language," was determined not to be subject to prosecution in the United States only because a consul was not considered a public minister. 1 Op. Att'y Gen. 41-42 (1794). Indeed, Attorney General William Bradford, in 1794, published an opinion in which he noted that the law of libel, when applied "in the case of a foreign public minister, . . . is strengthened by the law of nations, which secures the minister a peculiar protection, not only from violence, but also from insult." 1 Op. Att'y Gen. 52 (1794). *Accord* 1 Op. Att'y Gen. 73 (1794) ("it is usual [for foreign nations] to complain of insults to their ambassadors, and to require the parties to be brought to punishment"). The longstanding principle of diplomatic immunity reflects the same concern. One of the statutes enacted by the First Congress protected ambassadors from arrest and from suit. Any person who sought to prosecute or serve a writ upon an ambassador was subject to up to three years' imprisonment, as were his attorney and any official who sought to execute the writ. Act of Apr. 30, 1790, ch. 9, §§ 25-26, 1 Stat. 112, 117-18.[4]

It was assumed by the framers and ratifiers of the Constitution that our obligations under international law would be honored. In the course of their rebellion, the American colonies were quick to assure the world that the "law of nations [would be] strictly observed." 14 J. Cont. Cong. 635 (1779). The Continental Congress,

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[4] The Act of State doctrine is a reflection of *judicial* adherence to a similar principle: courts will allow what may be an expropriation to take place rather than inquire into the representations made by a foreign government with respect to acts within its borders, in part out of a reluctance to "give offense," Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 432 (1964), and in order to "avoid disrespect for foreign states." 1 *Restatement of Foreign Relations Law (Revised)* at 358 (Tent. Draft No. 6, 1985).

lacking meaningful authority, had to content itself with passing a resolution urging the states to provide judicial remedies for infringements of the rights of ambassadors. 21 J. Cont. Cong. 1136-37 (1781). This resolution was apparently ineffective, for Edmund Randolph was later, at the constitutional convention, to identify as one of the defects of the Articles of Confederation that "they could not cause infractions of treaties or of the law of nations, to be punished," and to note as an example that "[i]f the rights of an ambassador are invaded by any citizen it is only in a few states that any laws exist to punish the offender." 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 19, 25 (1911). In arguing for ratification, John Jay subsequently characterized it as "of high importance to the peace of America that she observe the law of nations." The Federalist No. 3, at 13 (P. Ford ed. 1898). *Accord* Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. Pa. L. Rev. 26, 55-56 (1952) ("the Constitution was framed in firm reliance upon the premise, frequently articulated, that . . . the Law of Nations in all its aspects familiar to men of learning in the eighteenth century was accepted by the framers, expressly or implicitly, as a constituent part of the national law of the United States").

As we have demonstrated, the framers understood that the protection of foreign embassies from insult was one of the central obligations of the law of nations. *See supra* pp. 9-11. Indeed, the Act of April 30, 1790, which provided for the imprisonment of anyone who sought to bring legal action against an ambassador, *see supra* p. 11, was enacted by a Congress that consisted of many of the framers of the Constitution, along with their contemporaries. That Act flatly denied access to the courts, which is a form of petitioning the government, and yet was assumed to be constitutional. As the Supreme Court has shown, it is often instructive to examine the

practices at the time of the Constitution's framing as a guide to understanding the meaning of its provisions. *See Marsh* v. *Chambers*, 463 U.S. 783 (1983).

These were among the considerations that motivated the Congress that enacted section 22-1115. These principles were repeatedly invoked during the debate on the Senate floor. Senator Pittman, the sponsor of this provision, commented:

> I believe that since the beginning of government the inviolability of ambassadors and ministers has been universally recognized in all civilized countries. Even in times of vicious wars special ambassadors from one of the hostile countries to the other have gone without guards, realizing that the honor of the country to which they were going was sufficient to protect their lives and to protect them in the performance of their duties. If this were not so, intercourse between governments would be practically impossible.

81 Cong. Rec. 8587 (1937). The issue of the law's constitutionality was the subject of some discussion, and Senator Pittman argued strenuously that there was no constitutional right to do that which was regulated by the statute:

> —to make an offensive demonstration in front of an embassy or in front of a legation, the residence of a diplomat, who is our guest here, who depends on us wholly for his protection not only against murder, not only against insult, but against any character of annoyance or interference that will bring the hatred of the people of his country against our people.

Id. at 8589.

The requirements imposed by international law have changed somewhat since the days of Vattel, since the founding of the Republic, and even since the era in which section 22-1115 was enacted. The legal principles em-

bodied in section 22-1115, however, have gained rather than lost force in the intervening years. Article 22 of the 1961 Vienna Convention on Diplomatic Relations, to which the United States is a signatory, sets out duties expected of a host state in regard to the mission premises of foreign nations. It states:

> 1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
>
> 2. *The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.*
>
> 3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Basic Documents in International Law 219 (Ian Brownlie ed. 1983) (emphasis added). The principles embodied in the Vienna Convention were for the most part already established under customary international law. According to Leonard Meeker, who as Legal Adviser to the State Department testified in favor of Senate ratification, "[t]he 1961 Vienna Conference examined the articles in the light of modern conditions, surveying the body of law and practice which had developed over the years regarding the rights, duties, and privileges of diplomatic missions" and "recognized the great need for an agreed international standard of treatment." *Hearing on the Vienna Convention on Diplomatic Relations Before the Subcomm. of the Senate Comm. on Foreign Relations*, 89th Cong., 1st Sess. 2 (1965).

Article 22 of the Vienna Convention was derived from draft article 20, which was adopted in 1958 by the International Law Commission. In its commentary on this

provision, the Commission stated that the receiving state bore a "special duty," and that it "must, in order to fulfill this obligation, take special measures—over and above those it takes to discharge its general duty of ensuring order." II *Yearbook of the International Law Commission 1958* at 78, 95. The Department of State has cited section 22-1115 as the concrete implementation by the United States of its legal obligations under paragraph two of article 22 of the Vienna Convention. *Hearing on the Vienna Convention on Diplomatic Relations Before the Subcomm. of the Senate Comm. on Foreign Relations*, *supra*, at 49.[8]

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[8] As we have indicated, Article 22 of the Vienna Convention created no new law, but rather codified doctrine that already existed. In similar fashion, the Harvard Draft Convention on Diplomatic Privileges and Immunities, published in 1932, provided that:

> A receiving state shall protect the premises occupied or used by a mission, or occupied by a member of a mission, against any invasion or other act tending to disturb the peace or dignity of the mission or of the members of a mission . . . .

26 Am. J. Int'l L. 20-21 (Supp. 1932). According to the commentary accompanying the Convention:

> Protection against invasion of the premises of a mission . . . means protection against any attempt to enter the premises against the will of the chief or other members of the mission. The duty, however, goes further than that. The receiving state is under a duty to protect the premises against any acts tending to interfere with the enjoyment or possession of such premises. . . . The special duty of protection of premises would include protection against crowds or mobs collected in the vicinity of the premises for the purpose of expressing abuse, contempt or even disapprobation of the sending state or of its mission, or of the members of a mission. A similar duty would seem to exist to protect such premises against so-called "picketing," this being an act tending to disturb the peace and dignity of the mission.

Id. at 56-57.

We think it clear beyond quibble that since the founding of our nation adherence to the law of nations, and most particularly that branch of the law that demands security for the persons and respect for the dignity and peace of foreign emissaries, has been regarded as a fundamental and compelling national interest. It is also clear that the founders, who explicitly gave Congress the power to enforce adherence to the standards of the law of nations, which they understood well, saw no incompatibility between this national interest and any guaranteed individual freedom.

B.

It must not be forgotten that a determination by the political branches concerning the obligations of the United States is also a determination about the conduct of American foreign policy. Defining and enforcing the United States' obligations under international law require the making of extremely sensitive policy decisions, decisions which will inevitably color our relationships with other nations. Such decisions "are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility . . . ." *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948).

A number of judicial doctrines embody the "classical deference [owed by courts] to the political branches in matters of foreign policy." *Regan* v. *Wald*, 468 U.S. 222, 242 (1984). For example, the Act of State doctrine, *see supra* note 4, "concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations," and derives from the "strong sense" that an absence of judicial restraint in that area "may hinder rather than further this country's pursuit of goals both for itself and for

the community of nations as a whole in the international sphere." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964). The political question doctrine requires that courts abstain from cases where there "is found a textually demonstrable constitutional commitment of the issue to a coordinate political department," *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), foreign affairs exemplifying perhaps the most prominent such commitment. *See Goldwater* v. *Carter*, 444 U.S. 996, 1002-06 (1979) (Rehnquist, J., joined by Burger, C.J., and Stewart and Stevens, JJ., concurring in the judgment). Similarly, the Court has repeatedly characterized immigration policy, "interwoven with . . . the conduct of foreign relations," *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-89 (1952), as "largely immune from judicial control." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (*quoting Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953)). These lines of doctrine are unified by the recognition that there are certain classes of decisions which courts are institutionally less suited to make.[6]

Deference to the judgment of Congress and the President in these matters is, of course, by no means absolute. But this is not a case in which we are asked to believe any implausible thing. It is obvious that ill treatment of ambassadors to the United States will adversely affect the interests of the United States. It is also obvious that the protection accorded those ambassadors by section 22-1115 is a limited one and regulates speech to a very minimal extent. Strictly speaking, it may be doubted whether there is any need for any particular deference to the judgment of the political branches in order to uphold this statute. But if there is such a need, it is amply met.

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[6] Contrary to the suggestion made by the dissent, dissent at 16 n.8, first amendment cases are no exception to this principle. *See* Kleindienst v. Mandel, 408 U.S. 753 (1972).

We have here an unusually strong case for judicial deference, over and above the traditional and general requirement of restraint in the area of foreign relations, for we are asked to review a statute which both Congress and successive Presidents have declared to be necessary to fulfill our obligations under both customary international law and a treaty which we have signed. It has long been understood that the interpretation given by the executive branch of the country's responsibilities under the treaties to which it is a signatory are entitled to "great weight." *See Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 184-85 (1982); *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961). This necessarily shapes the nature of the scrutiny to which we subject the justifications offered for section 22-1115, for in this context a court cannot lightly dispute a determination by the political branches that the statute meets important international obligations, that the interests at stake are compelling, or that those interests cannot be met by a statute with a more narrow reach. When a provision is enacted in order to bring the United States into compliance with international law, and when those obligations are reaffirmed by treaty, a court must give careful consideration before it sets aside that which the legislative and executive branches have deemed necessary to fulfill the nation's international responsibilities. It would be quite improper for the judiciary to disregard international obligations that are inseparable from our nationhood.

C.

We accept, as highly pertinent to the compelling interests served by section 22-1115, the uncontradicted assertions made in the government affidavits, which describe the sensitive foreign policy concerns the statute implicates. Contrary to the suggestion made by the dissent, we do not uphold the statute "simply because the government has sent its lawyers into court to defend it." Dissent at 27. The presence of a first amendment claim

requires that the court examine the balance struck by the political branches. The deference we owe is not to the government's *legal* judgment that the statute is constitutional, but to their factual discussion of the nature and depth of the foreign relations interests that are involved. (As we have said, with or without such deference, it is obvious that these interests are genuinely present.) Once we accept that these interests exist, it becomes the responsibility of the court to determine whether they justify the statute before us.

The four uncontradicted declarations submitted by defendants below indicate some of the special concerns justifying the unique measures imposed by section 22-1115.[7] The two State Department officials cite the Vienna Convention as the source of the international obligation honored by the statute. Declaration of James E. Nolan, Jr., R.E. at 46; Declaration of David Fields, R.E. at 36-37. The Vienna Convention, as we have explained, codified both the responsibility to provide security to foreign embassies and the responsibility to protect them from affront. The affidavits do not explain, nor need they, that it constitutes an affront to display a sign that char-

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[7] Appellants claim that the district court's reliance on the assertions contained in these declarations was improper and in the event their argument that the statute is facially unconstitutional is rejected, they urge that we remand the case so that the assertions can be contested at trial. Appellants misconceive the responsibility of a party opposing a motion for summary judgment. The mere mention to the district court that plaintiffs "vigorously dispute" statements made in declarations, R.E. at 60, without any supporting citations to the record, *see* Local Rule 1-9(i), will not serve to call into question the contentions made by the opposing parties. *See* Fed. R. Civ. P. 56(e) ("When a motion for summary judgment is made and supported . . . an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.").

acterizes members of a government as, for example, "killers." Expert judgment is hardly necessary on such a point. What the affidavits provide is a detailed description of the special difficulties associated with ensuring the security of foreign embassies, and the consequences of failing to do so.

Both David Fields—the State Department official responsible for coordinating security arrangements for diplomatic personnel in the District—and James Nolan—Director of the Office of Foreign Missions—attested to the existence of a direct relationship between the perception held by other governments of the strength of security provided their diplomats here and the extent of protection they choose to provide ours. In Nolan's words, "[t]o compromise on the security provided to foreign missions here is to compromise on the security of our personnel in our missions overseas. What happens in terms of security provided to foreign diplomatic personnel and premises here has a direct impact on the protection afforded U.S. missions and personnel abroad." Declaration of James E. Nolan, Jr. at 2, R.E. at 47. *Accord* Declaration of David Fields at 2, R.E. at 37. These concerns were very much in the mind of Congress when it enacted section 22-1115. Senator Pittman explained that "the motive that actuates us today is to have the foreigners upon whom we must depend for the protection of our citizens friendly to us." 81 Cong. Rec. 8485 (1937). This was echoed by Cordell Hull, then Secretary of State, who urged passage of the statute in a letter to Senator Pittman: "Unless we extend such reasonable protection to representatives of other governments, we cannot hope to receive protection for our representatives abroad." *Id.* at 8486. Foreign governments may not all be expected to preserve the same equanimity in the face of hostile demonstrations that we require of domestic government. Moreover, foreign governments, not being subject to United States law, particularly constitutional law, as

American officials are, have ways of retaliating against American interests and Americans, whether official representatives or private citizens, abroad.

As the declarations of the Secret Service agent who heads the Office of Protective Operations, Thomas Quinn, and the Commanding Officer of the Special Operations Division of the Metropolitan Police Department, Deputy Chief of Police John Connor, reveal, there are unique obstacles to providing adequate security to foreign embassies—the most significant of which is the inability of police personnel to establish a presence inside the buildings. The Quinn declaration is worth quoting at length:

> 2. In many respects the obstacles confronting the Secret Service in providing security for foreign embassies, legations and consulates are much greater than those encountered in protecting personnel and property of the United States. At the White House and at the residence of the Vice President, for example, the Secret Service maintains a presence inside the structures which enables it to deploy a defensive network consisting of a number of manned perimeter posts radiating out from a centralized command center. The Secret Service's permanent on-site presence has also facilitated the installation of sophisticated surveillance equipment which enables Secret Service personnel to continuously monitor the area between the building and the fence which surrounds the site. Although the task of insuring the safety of the White House complex and the residence of the Vice President is extremely difficult, it would be impossible were the Secret Service subject to the same legal constraints that control Secret Service operations at foreign embassies, consulates, and legations.
>
> 3. The structures which house the diplomatic operations of foreign nations provide a tangible focal point to those wishing to demonstrate against the policies of the foreign government. Recent events underscore the fact that demonstrations near embassies or other official foreign government buildings,

> even if initially peaceful, exacerbate tensions and often lead to violent confrontations between the police and demonstrators. However, in contrast to the White House and other official buildings of the United States, Secret Service personnel are prohibited by international law and comity from entering onto the premises of a foreign embassy, legation, or consulate except with the expressed prior approval of the foreign government. Consequently, at such locations, the Secret Service has no centrally located defensive command center, has a minimal amount of intrusion detection equipment at its disposal, and, perhaps most important, has no secondary or fall-back defensive position which would otherwise be available if the Secret Service were permitted to position personnel inside the protected premises.

Declaration of Thomas D. Quinn at 2-3, R.E. at 42-43. The 500-foot buffer therefore provides "a necessary zone for police response in those instances when the perimeter is breached." Declaration of John C. Connor at 2, R.E. at 49.[8]

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[8] The Fields Declaration cites an incident that illustrates the importance of this buffer:

> Another example of this problem occurred recently in connection with a demonstration near the Soviet Embassy here by a group of Afghans protesting the Soviet invasion of Afghanistan. The demonstrators broke through police lines, but due to the 500-foot distance separating them from the Embassy premises, police were able to re-establish control, making a number of arrests in the process, before the demonstrators could reach the building. Had the distance separating the demonstrators from the Embassy been less, the results probably would have been quite different, and property damage and personal injury to the embassy and its occupants might well have resulted, with potentially serious consequences for U.S. foreign relations and the security of U.S. personnel overseas.

Declaration of David Fields at 3-4, R.E. at 38-39.

D.

It has long been understood that the right to demonstrate may be made to depend in part on the site of the protest. The Supreme Court has upheld the constitutionality of laws regulating protests in front of a courthouse on the basis of the State's "legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create." *Cox* v. *Louisiana*, 379 U.S. 559, 562 (1965). It has upheld the application of a general trespass statute to demonstrations at jails, jails having been "built for security purposes." *Adderley* v. *Florida*, 385 U.S. 39, 41 (1966). It has upheld the exclusion of political candidates from military bases, the function of military bases being "to train soldiers" rather than host political events. *Greer* v. *Spock*, 424 U.S. 828, 838 (1976). And it has upheld the regulation of expressive activity near a school when such activity might disturb the educational activities inside. *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972). Each of these cases makes clear that the nature and extent of first amendment rights may vary with the location at which their exercise is sought.

Appellants offer extensive analogies to prior cases involving protests in front of the White House, the Capitol, and the Supreme Court, but the regulations in those cases simply did not implicate the same set of interests addressed by section 22-1115. First, shielding government officials from public protest is incompatible with our democratic structure, which relies on public criticism as a means of promoting responsive government. Foreign ambassadors, in contrast, have no similar obligation to be accessible to public attack, and our polity does not have the same interest in ensuring that they are. Second, we cannot ignore the fact that American diplomats living overseas are always to some degree at risk. The perception abroad that our government is diminishing the protection accorded the embassies to whom we are host

would, we are told, seriously compound that risk. Finally, and most fundamentally, we face here a question of living up to our obligations under international law and a treaty. These considerations distinguish the issues presented here from those involving protests in front of the White House, the Capitol, and the Supreme Court.

Section 22-1115, then, is a statute supported by a compelling governmental interest and one which imposes only a very minor geographic limitation on speech. It is impossible for us to see how the compelling interest at stake could be served with a regulation that had any significantly smaller impact on speech.

The statute that Congress has crafted proscribes an opposition demonstration only within a narrowly defined locus. Plaintiffs are free under section 22-1115 to hold an anti-Soviet demonstration anywhere in the city but within 500 feet of the Soviet Embassy. Appellants presumably feel that the embassy location would generate heightened visibility and best help them succeed in getting their message across. But the first amendment does not guarantee an optimal setting for speech; there is no right to the backdrop most interesting to press photographers or television cameramen. *See Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *Adderley* v. *Florida*, 385 U.S. at 47-48; *White House Vigil for the ERA Committee* v. *Clark*, 746 F.2d at 1520, 1538 (D.C. Cir. 1984). Inevitably, many of the most desirable places to demonstrate will be buildings and areas that for other reasons require special protective measures. We think Congress has met an unusually difficult problem with a balanced attempt to restrict no more speech than necessary.[9]

[9] Appellants suggest that the existence of 18 U.S.C. § 112(b) (1982) demonstrates that Congress could have achieved the same ends with a narrower statute. 18 U.S.C. § 112(b) regulates demonstrations near embassies and other buildings owned by foreign governments *outside* the District of Columbia, and is somewhat less restrictive than § 22-1115 of the D.C. Code. The unstated premise of this argument, however, is that the governmental interests at stake in these two statutes are indistinguishable. In fact, the same Congress that enacted § 112(b) in its present form—amending a more restrictive version than had been enacted some years before—left § 22-1115 alone. There are several plausible reasons why Congress might choose to differentiate between the two. The greater concentration of embassies in the District of Columbia, and the special visibility of the capital, may well make enhanced protection necessary. In addition, Congress relies to some extent on the state and local governments to provide whatever additional measures are necessary to protect foreign nationals, aware perhaps that security needs may differ from state to state. *See* Concerned Jewish Youth v. McGuire, 621 F.2d 471, 475 (2d Cir. 1980) (18 U.S.C. § 112(b) did not set "maximum standards of protection," and left open possibility of local authorities using "stricter controls"). Therefore, the fact that Congress generally exercises much more direct and specific authority over municipal activities in the District of Columbia than those in other cities may well explain the differences between the measures adopted in the two statutes. We note in this regard that the authority of the United States Secret Service over matters involving the protection of foreign embassies is substantially greater for those embassies located within the District than for those located outside. 3 U.S.C. § 202 (1982).

The obligations of the United States under international law, reaffirmed by treaty, do not, of course, supersede the first amendment. Neither, however, has it ever been suggested that the first amendment is incompatible with the United States' most basic obligations under the law of nations. The two must be accommodated and section 22-1115 accomplishes an accommodation well within the range of the permissible. That may be seen by imagining a shift of the balance in either direction. Were we to hold that the first amendment requires Congress to allow protests and demonstrations up to the gate of an embassy, there would be very little left of the United States' international obligation to preserve the peace, dignity, and security of foreign representatives in

our nation's capital. Peace and dignity would be destroyed outright, while, as a practical matter, the task of repulsing invasions of the embassy and its grounds would be left largely to the foreign nation's security forces. Violence between American citizens and foreign security forces in Washington, D.C., is hardly calculated to improve relations between governments or to be thought by the international community to be an adequate discharge of America's international obligations. If, on the other hand, Congress tried to protect foreign representatives from all affronts, it would have to rule off limits all utterances anywhere tending to bring foreign governments into disrepute. That, of course, is unthinkable. The first amendment would have been destroyed over wide areas in the name of international law. What has been done through section 22-1115 is to give first amendment freedoms the widest scope possible consistent with the law of nations. Appellants, and all other Americans, may freely express their sentiments about the actions of the Soviet Union and Nicaragua on radio and television, in print, by speech or placard, and they may do so anywhere in the United States, but they may not carry the described placard or congregate within 500 feet of the embassy of the nation concerned. To regard that trifling limitation, enacted under a power explicitly given by the Constitution, as a threat to freedom of speech seems to us a considerable exaggeration.

E.

The dissenting opinion offers a number of objections to our analysis. At this point we undertake to respond to the related arguments that the statute serves no compelling governmental interest, that it is both overinclusive and underinclusive, and that it is unconstitutional because there is a less restrictive alternative available. We think that these arguments are not only defective but that, in an important respect, the first and the third contradict one another.

The dissent regards the interest in maintaining our nation's adherence to longstanding principles of international law as not compelling. In the dissent's view, that interest is so far from compelling that, aside from providing an initial source of authority for the congressional enactment, the law of nations does not bear at all on the question of that enactment's constitutionality. This line of attack requires the dissent to trivialize the compelling national interests that are reflected in international law. When these interests are given their appropriate weight, however, the dissent's constitutional argument—which is premised on its utter rejection of those interests—is revealed as beside the point.

The dissent's analysis appears to rest on the assumption that this court must either hold that international law "supersede[s]" constitutional requirements (as we are charged with doing, dissent at 12), or conclude that international law is irrelevant and conduct the analysis as if no principle of international law were present (as the dissent does). Both propositions would be incorrect.

If international law were, as the dissent views it, just another code of rules, like the common law of negligence or statutory law governing commercial transactions, it would of course offer little that need be weighed against a constitutional provision. As a matter of formal description, leaving aside the real interests in play, it is true that in the American legal hierarchy, the Constitution trumps all other law. But it is also true, as the dissent systematically overlooks, that other law sometimes expresses values and concerns that are of legitimate constitutional dimension. In such cases, the assertion that the Constitution cannot be overridden by ordinary law is true but analytically empty. As we have tried to make clear, international law in the aspect dealt with here is important not in the merely formal sense just described but because it embodies American interests that are

themselves given weight in the Constitution and that must, for that reason, find accommodation with the first amendment. Those interests have to do with the place of the United States among nations, with the respect it is accorded, with the raising or lowering of tensions between our country and others, with the conduct of our foreign policy, primarily by the President but also in some measure by Congress in ways specified by the Constitution, and, in extreme cases, with war and peace. When, in the considered judgment of the branches charged by the Constitution with the responsibility for these matters, a minor regulation of picketing is necessary to preserve the peace and dignity of foreign emissaries, it is preposterous to say that no interest is present that courts need to respect and weigh.

While the dissent appears to concede that "the nature of an embassy and our responsibilities as international hosts do weigh in the balance as to what is permissible regulation of free speech in that particular place," dissent at 13, it chooses to ignore completely the definitions given those responsibilities by Congress, the President, and codified and customary international law in favor of its own. One reads the dissent's analysis of the dignity interest in vain for a hint that any such responsibilities are involved here. Dissent at 18-21. The dissent rejects this interest on the basis of a generalization—people ought not be shielded from speech they find distasteful—that has never been applied in this context, as if the context were irrelevant. Any "weighing" the dissent has done is invisible. We think the founders would have been quite surprised to learn that the document in which they constituted the government precludes the enactment of a statute to honor one of the core principles of the law of nations because that interest is not "compelling."

The dissent also employs an all-or-nothing theory of compelling governmental interests to argue, so far as

one can tell, that the United States must either abandon any attempt to protect the peace and dignity of foreign embassies or impose nationwide censorship over all modes of expression that might conceivably insult any foreign government. Dissent at 9-11. The dissent notes that the government has never sought to ban all conceivable affronts to foreign governments, and concludes from this that America's international obligation is "flexible," *id.* at 17, thus not compelling, and hence, in effect, constitutionally non-existent. Going to the other extreme, the dissent wonders how, if section 22-1115 is supported by a compelling governmental interest, the ban can be so limited. The dissent implies that our analysis would support a nationwide suppression of any criticism of foreign governments, which the dissent finds "worrisome." *Id.* at 21. The Vienna Convention specifically requires protection of *embassy premises*, not of foreign sensibilities about what is printed in American newspapers. But that fact aside, the dissent's is a startling mode of constitutional analysis: faced with a spectrum between competing constitutional values, a court must override one value completely and take the other to its extreme. A court faced with the competing constitutional demands of fair trials and press freedom could resolve the issue, apparently, only by prohibiting any press reports of any criminal proceedings or by throwing the entire process open, even to the extent of allowing television cameras into the deliberations of the grand and petit juries. Either result would be absurd. We can uphold, for example, a decibel limit applied to soundtrucks without fear that the same rationale—preserving the public peace—would equally well support the silencing of all speech everywhere. The everyday business of judging is the exercise of judgment, of balance, of accommodation, not the announcement that no value may be admitted into the calculus which, if carried to its extreme and applied without regard to competing values, would produce an unacceptable result.

The dissent challenges also our holding that the statute is sufficiently tailored, and concludes that the regulation is both overinclusive and underinclusive. However, its discussion measures the statute only against the interest in security, having eliminated the interest in peace and dignity from the analysis. Since we have shown that this second interest is valid as well, we need express no judgment on whether the security interest, standing alone, would be sufficient to justify the constitutionality of section 22-1115.

The dissent argues in addition, however, that even if the statute were adequately tailored it would be unconstitutional because there exists a less restrictive alternative: a statute barring *all* demonstrations within five hundred feet of an embassy. It seems somewhat odd to describe an alternative that restricts more speech as "less restrictive." While there certainly is more involved in the examination of alternatives than simply "comparing the number of syllables that are uttered" under each, dissent at 33, an alternative statute that restricts *every* exercise of expression regulated by the statute before us *and* other, presently unregulated, speech activities as well, is not (whatever other virtues it may possess) a less restrictive alternative.[10]

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[10] The dissent is correct when it points out that "the 'greater' power does not necessarily include the lesser." Dissent at 31. Therefore, the fact that a broad, content-neutral prohibition would be constitutional does not, by itself, imply that all less broad, content-based statutes are *necessarily* constitutional too. In *Police Department of the City of Chicago* v. *Mosley*, 408 U.S. 92 (1972), *Grayned* v. *Rockford*, 408 U.S. 104 (1972), and *Carey* v. *Brown*, 447 U.S. 455, 461-62 (1980), the mere fact that total antipicketing laws might be constitutional did not justify laws that permitted some picketing but not others on the basis of content. In those cases, however, the statutes were infirm not because there was a constitutionally acceptable content-neutral alternative, but because the distinctions embodied in the statutes were not narrowly tailored to serve compelling government interests.

The dissent takes an unwarranted step when it concludes that section 22-1115 is unconstitutional because a broader time, place, or manner regulation would be constitutionally acceptable and would accomplish the same ends. While Congress is free to enact such a statute, it need not do so.[11] Under the dissent's theory, the law upheld in *Cox* v. *Louisiana*, which prohibited picketing near a courthouse "with the intent of influencing any judge, juror, witness, or court officer," ought to have been struck down because the local government was free to ban *all* picketing near a courthouse. The law in *Young* v. *American Mini Theatres*, which forbade adult theatres from locating within 1,000 feet of other adult theatres, ought to have been invalidated because such a restriction could lawfully have been applied, and therefore could *only* lawfully have been applied, to *all* theatres. The dissent's position requires as well that we regard the unpublished order issued by a panel of this court (Judges Wright, Leventhal and Robb) in *Jackalone* v. *Andrus*, No. 79-2359 (D.C. Cir. Nov. 19, 1979), as wrong. In *Jackalone*, we "accept[ed] the representation of the State Department that a demonstration at Lafayette Park has an unacceptable potential for danger to the hostages now being held in the American Embassy in Tehran," and upheld its prohibition. *Id.* While that order, being unpublished, is not precedent, we think it instructive to note that the dissent's analysis would have required that the prohibition on demonstrations relating to the Iranian situation that was upheld in the order be voided, with the government allowed to choose only be-

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[11] The dissent's heavy reliance on *Schacht* v. *United States*, 398 U.S. 58 (1970), is misplaced. The viewpoint-discrimination in *Schacht* did not serve *any* legitimate governmental interest. It appears from the decision that the government did not claim otherwise, and chose to defend its position on other grounds.

tween permitting the demonstration or banning all demonstrations in that area.[12]

The dissent's analysis thus reads a grave threat to liberty in every statutory distinction related to the purpose of the statute, and inexorably leads to a requirement of a total ban within the proscribed area. This would present a new element in first amendment jurisprudence—a "most restrictive alternative" doctrine. The cure suggested is far broader than the problem. One supposes that Father Finzer, if he won his case on such a ground, might reasonably consider his victory Pyrrhic. Nothing is solved by such a "solution."

The dissent's assertion that it would be constitutional to prohibit *all* demonstrations near embassies—an assertion necessary to its claim that the present statute is unconstitutional because there exists a "less restrictive" alternative—undercuts another key premise of its argu-

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[12] The dissent need not be troubled by our citation of this unpublished order. The Circuit Rule only forbids citing such orders "as precedent," Western Union Telegraph Co. v. FCC, 773 F.2d 375, 377 n.1 (D.C. Cir. 1985), which we do not do. We mention *Jackalone* only because it serves to illustrate a realistic scenario in which the dissent's theory would require an incorrect result. While the regulation under which the permit in *Jackalone* was denied is content-neutral, it is clear from the brief that the government's rationale for forbidding the demonstration by Iranian students in front of the Iranian embassy was that the demonstration was likely to attract hostile onlookers, and that news reports describing and televising Americans shouting obscenities at Iranian students in front of the embassy would have endangered American diplomatic personnel in Iran by angering the Iranian government. This judgment was made on the basis of the content and viewpoint of the demonstration, and on the nationality of the demonstrators. While this is an extreme example, the parallels to § 22-1115 are evident, since the dissent's requirement that neutral prohibitions be chosen over non-neutral ones is not affected by the strength of the governmental interest involved.

ment because it cannot be squared with the dissent's rejection of any valid interest in protecting the peace and dignity of embassies. As the dissent agrees, a law prohibiting a lone protester carrying a sign of any sort bears no relation to safeguarding the physical security of the building and its occupants. Dissent at 23. The only conceivable interest that would support such a restriction of speech is that of dignity and peace. The dissent admits as much when it states that its proposed total ban "would provide greater protection from the dangers to both dignity and security than the current regulation does." Dissent at 39. The dissent's endorsement of the constitutionality of such a statute is a recognition, therefore, that political speech near an embassy poses a special problem that is of constitutional magnitude, and that problem is the one the dissent elsewhere denigrates, the need to maintain the peace and dignity of foreign emissaries. The dissent thus necessarily concedes implicitly what it denies explicitly.

The dissent compounds its analytic difficulties by suggesting (without explanation) that this interest, while not "compelling," might be "significant" and that it therefore would justify a statute that is content-neutral but not one that is content-based. Dissent at 39-40 n.23. The dissent never reveals the process by which it calibrates these standards, so there is no way of knowing why the interest in honoring international obligations, and the foreign policy concerns implicated by those obligations, rise so far and no further. Certainly there is nothing in the dissent's analysis of the dignity interest that provides the answer. That discussion, as we have noted, approaches this interest by completely abstracting it from the international context in which it arises, and rejects our holding that it is compelling simply by noting that individuals may not be "shield[ed] . . . from hearing things they find offensive," when that offensiveness is based "on the fact that the audience disagrees." *Id.* at 18-19.

There are at least two answers to this truism. The first is that the proposition was designed for members of the American political community. They may not be shielded from speech with which they disagree because the competition of ideas is central to our democratic process. That rationale has nothing to do with giving offense to a foreign ambassador. The dissent never addresses this point. It merely notes that public criticism of foreign governments may affect the domestic political debate. While the assertion is true, it does nothing to salvage the dissent's challenge to the interest in preserving the peace and dignity of the embassy, since that challenge is grounded in the principle that there is no legitimate interest in shielding listeners from speech they find offensive. The identity of the listener is relevant to the question of when this principle applies.

The second answer is that, were it applicable here, the proposition advanced would make it impossible to sustain the dissent's position. The interest in shielding people from political speech with which they disagree is neither compelling nor important nor legitimate, and cannot justify a statute enacted for that end even if, in order to make it more constitutionally palatable, the legislature bans favorable speech at the same time. If the serious and substantial foreign policy concerns we have described are not present, then a content-neutral statute passed in order to forestall critical speech (by banning all speech) would be unconstitutional. If, as we believe, and as the governmental branches entrusted with judgment on these matters have asserted, these concerns are in fact deeply implicated, they are quite clearly compelling.

IV.

We turn now to the challenge presented by appellants, which is in some respects quite different from that made by the dissent. For obvious reasons, the appellants do not suggest that prohibiting their demonstration would

be permissible as long as others are prohibited as well. While they urge upon us several distinct grounds for reversing the decision below, they too emphasize the issues of content and viewpoint discrimination. As we have explained, the first provision of the statute they seek to invalidate applies only to demonstrations in which signs are displayed that are designed to bring a foreign government into "public odium" or "public disrepute." Their legal challenge relies heavily on this element of the statute as the root of its constitutional infirmity, raising claims grounded in the first amendment guarantees of free speech and assembly and the fourteenth amendment guarantee of equal protection.

Content-based restrictions have been held to raise both first and fourteenth amendment claims because in the course of regulating speech, they differentiate between types of speech. *Compare Widmar* v. *Vincent*, 454 U.S. 263 (1981) (exclusion of religious speech from public forum violates first amendment right of free speech) *with Police Department of the City of Chicago* v. *Mosley*, 408 U.S. 92 (1972) (exemption of labor picketing from ban on picketing near schools violates fourteenth amendment right of equal protection). Under either theory, such a statute is valid only if "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." *Perry Education Association* v. *Perry Local Educators' Association*, 460 U.S. 37, 45 (1983); *accord Carey* v. *Brown*, 447 U.S. 455, 461-62 (1980).

Appellants do not concede that this is the relevant test. Instead, they point to language in *Mosley*, 408 U.S. 92 (1972), and *Regan* v. *Time*, 468 U.S. 641 (1984), which might seem to suggest a total ban on content-based restrictions of any sort. Were appellants correct, first amendment law would have been revolutionized. The Court, it would have to be supposed, has overruled *sub silentio New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) (heightened protection accorded writings about

"public figures"), *Ginsburg* v. *New York*, 390 U.S. 629 (1968) (upholding obscenity regulation), and *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942) (upholding prohibition of use of "fighting words"), as well as a host of other decisions too numerous to mention here. No such upheaval has taken place. In *Mosley*, the Court invalidated a city ordinance that prohibited all picketing within one hundred and fifty feet of a school, except peaceful labor picketing of any school involved in a labor dispute. Although the opinion in *Mosley* contains *dicta* suggesting that content-based restrictions are "never permitted," 408 U.S. at 99, the Court in that case in fact conducted the traditional analysis and determined that the statute in question was not sufficiently tailored to its objectives. *Id.* at 100-101. Were content-based restrictions automatically unconstitutional, that discussion would have been unnecessary. In *Regan* v. *Time*, the Court found unconstitutional a statutory scheme which made it a crime to photograph securities or obligations of the United States unless "for philatelic, numismatic, educational, historical, or newsworthy purposes," 18 U.S.C. § 504 (1982), finding that a determination of newsworthiness or educational value was necessarily content-based. The government defendants, however, had declined to defend the constitutionality of the content-based regulation as written, arguing that the provision in question was not in fact mandatory. 468 U.S. at 649 n.5. Although the majority opinion includes the assertion that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment," *id.* at 648-49, the absence of the traditional balancing analysis can likely be attributed to the refusal of the government to put forward any governmental interest served by the provision as written for the Court to balance. We note that in a case decided after *Regan*, this court declined to adopt the extreme view urged by appellants here and reaffirmed the continuing validity of the "narrowly tailored to compelling state interest" test. *White House Vigil for the ERA Committee* v. *Clark*, 746 F.2d 1518, 1526 n.66 (D.C. Cir. 1984).

Appellants argue alternatively that even if content-based restrictions are generally subject to a balancing test, section 22-1115 is not. They point out that this statute represents not only *content* discrimination, but *viewpoint* discrimination as well. While a prohibition of, for example, all political speech near an embassy would be a content-based restriction arguably subject to the standard described above, a prohibition of speech that brings a foreign government into disrepute is a viewpoint-based restriction that appellants contend is *per se* unconstitutional. They maintain that the fact that the statute is viewpoint-discriminatory, "standing alone," renders it invalid, Reply Brief for Plaintiffs-Appellants at 1-2. This is presumably why they characterized the declarations submitted below by defendants as "not relevant or material to any issue involved in this case." Brief for Plaintiffs-Appellants at 58.

We do not think the law is more severe with respect to viewpoint-based restrictions than it is to content-based restrictions. Although some academic commentators have urged that there be different tests for those content-based restrictions that are viewpoint-neutral and those that are not,[13] the Supreme Court has maintained a uniform standard. *See Carey* v. *Brown*, 447 U.S. at 462 n.6. Indeed, the suggestion that a statute which is not viewpoint-neutral is automatically invalid was put to rest in *Parker* v. *Levy*, 417 U.S. 733 (1974), which upheld the constitutionality of laws prohibiting members of the armed forces

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[13] *See, e.g.*, Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 Geo. L.J. 727 (1980); Stephan, *The First Amendment and Content Discrimination*, 68 Va. L. Rev. 203 (1982); Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81 (1978).

from making speeches which "bring discredit upon the armed forces," 10 U.S.C. § 934 (1982).[14]

Statutes that regulate speech in ways that affect different viewpoints differently may well be less likely to be upheld than statutes which affect all viewpoints equally, but that is simply because there are fewer situations that justify differentiation according to the speaker's viewpoint. The standard for justification remains the same.[15]

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[14] Contrary to the suggestion made by the dissent, dissent at 34 n.18, we do not attribute "relevance to the Court's silence" in *Parker*, for the Court was not silent. In the course of rejecting the overbreadth challenge, the Court held that Levy's conduct—illegal because of the *content* of his public statements, 417 U.S. at 736-37, 739—was "unprotected under the most expansive notions of the First Amendment" and that the regulations at issue "may constitutionally prohibit" it. *Id.* at 761. The dissent correctly notes that the reasoning in *Parker* relies heavily on the military context of these regulations. We therefore do not regard *Parker* as dispositive in this case, except insofar as it demonstrates that the suggestion by appellants that all viewpoint distinctions are *per se* unconstitutional is unfounded—a suggestion about which the dissent is ambivalent. Dissent at 36.

[15] Under the most recent Supreme Court precedent, § 22-1115 may not in fact qualify as a content-based statute. In City of Renton v. Playtime Theatres, Inc., 54 U.S.L.W. 4160 (Feb. 25, 1986), the Court found constitutional a zoning ordinance that prohibits "adult" motion picture theatres from locating within one thousand feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Writing for six members of the Court, Justice Rehnquist explained that while the ordinance "treats theatres that specialize in adult films differently from other kinds of theatres," it nevertheless was aimed not at the *content* of the films "but rather at the *secondary effects* of such theatres on the surrounding community." *Id.* at 4162 (emphasis in original). It was thus "completely consistent with our definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.'" *Id.* (*quoting* Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (emphasis added in *City of Renton*)). Similarly, § 22-1115, while differentiating on the basis of the content of the speech, is justified by reference to content-neutral values—the need to adhere to principles of international law and to provide sufficient protection to foreign embassies. Because we are not entirely sure, from *City of Renton* alone, whether § 22-1115 is the sort of statute that can be analyzed under the standard applicable to content-neutral time, place and manner restrictions, and because we believe it meets the more stringent standard to which content-based restrictions have traditionally been held, we focus on that latter standard.

V.

We stated in Part III our holding that the interests which section 22-1115 was enacted to serve are indisputably compelling. Appellants have not seriously contested that point, although neither have they conceded it. Their argument is rather that regardless of the importance of the statute's ends, the means it establishes are unconstitutionally vague, standardless, facially overbroad, and discriminatory. We now take up each set of claims in turn.

A.

The issue of vagueness requires no lengthy discussion. Whatever ambiguity may exist at the fringes, section 22-1115 applies clearly and directly to the activities in which the parties who brought this action wish to engage. The complaint they filed made precisely that admission: "[P]laintiffs wish peacefully to carry banners, placards, signs and devices which depict messages critical of foreign governments, and their acts and policies. They wish to do so on the public streets and sidewalks in the District of Columbia, within 500 feet of the official buildings of the foreign governments whose acts and policies they intend to criticize." Complaint at 3-4, R.E. at 6-7. There is no ambiguity, therefore, in the statute's application to the conduct primarily at issue. *See Young* v. *American Mini Theatres*, 427 U.S. 50, 58-59 (1976) (holding it "unnecessary" to consider vagueness challenge to an ordi-

nance "unquestionably applicable" to the parties before the Court).

Nor in any event is section 22-1115 unconstitutionally vague. With this statute, as with virtually all statutes, it is undoubtedly the case that a skilled legal "imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question." *American Communications Association* v. *Douds*, 339 U.S. 382, 412 (1950). Nevertheless, its language is straightforward. As this court has previously observed, "[s]ection 22-1115 meticulously specifies the consequences against which it erects protection for foreign governments." *Zaimi* v. *United States*, 476 F.2d 511, 526 (D.C. Cir. 1973). Both demonstrators and law enforcement officers are given a clear description of the activity the statute proscribes, and there is no reason to believe that a substantial amount of conduct outside its scope is being deterred. Section 22-1115 defines the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement," *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983), and that is all that is required.

B.

Appellants challenge that portion of section 22-1115 which forbids congregating within five hundred feet of the official buildings after police authorities have ordered dispersal on the ground that the provision does not contain standards defining when such orders can be given. They cite only one case in support of this argument—*Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969). They assert that *Shuttlesworth* is "dispositive," because section 22-1115—like the statute struck down in *Shuttlesworth*—confers "absolute discretion" on city officials to prevent a public demonstration. Brief for Plaintiffs-Appellants at 53. The dissent agrees with this argument, and finds controlling our decision in *United States* v. *Abney*, 534 F.2d

984 (1976) (per curiam). We disagree; the statutes are more different than they are similar, and their differences are constitutionally relevant. The statute in *Shuttlesworth* governed all demonstrations taking place in the public streets of Birmingham. Demonstrators were required to obtain a permit from the city, which could be denied if the relevant commission determined "in its judgment [that] the public welfare, peace, safety, health, decency, good order, morals or convenience" so required. 394 U.S. at 149. The regulation in *Abney* required anyone wishing to sleep, camp or loiter in Lafayette Park for more than four hours to obtain a permit from the Superintendent. The final clause of section 22-1115, in contrast, governs only the sensitive areas surrounding foreign embassies and other such official buildings. It establishes no permit procedure applicable to all demonstrations, but authorizes policemen who are on the scene to order dispersal.

We find unconvincing the dissent's argument that procedures requiring permits, such as those invalidated in *Shuttlesworth* and *Abney*, are constitutionally indistinguishable from the police discretion involved here. Police have always possessed authority to require people to move when a statute supplies the criteria that guide and confine police discretion. This court upheld two such statutes granting police discretion no broader than that given by section 22-1115 in *Washington Mobilization Committee* v. *Cullinane*, 566 F.2d 107 (D.C. Cir. 1977). Section 22-1121(2) of the District of Columbia Code, provides:

> Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby—
>
> . . . .
>
> (2) congregates with others on a public street and refuses to move on when ordered by the police;
>
> shall be fined not more than $250 or imprisoned not more than ninety days, or both.

This statute requires the police to judge what constitutes a breach of the peace and what circumstances may lead to a breach of the peace, judgments of the same nature as those required by section 22-1115. Additionally, Article VI, § 5a of the District's police regulations, known as the Police Line Regulation, authorizes a police officer to clear an area of the size he considers "necessary" for a variety of purposes when fires, accidents, etc., or "other occasions cause or may cause" persons to collect. Every person "shall comply with any necessary order or instruction of any police officer." [16] This court, in reversing the district court's invalidation of the regulation as allowing "unfettered discretion," pointed out that it could not be known in advance what would be necessary on particular occasions so that "the regulation's definition of the scope

[16] The pertinent text of the Police Line Regulation is as follows:

> Sec. 5a. When fires, accidents, wrecks, explosions, parades, or other occasions cause or may cause persons to collect on the public streets, alleys, highways, or parkings, the Chief of Police, inspector, captain of police, or officer acting for him, may establish such area or zone as he considers necessary for the purpose of affording a clearing for: (1) the operation of firemen or policemen; (2) the passage of a parade; (3) the movement of traffic; (4) the exclusion of the public from the vicinity of a riot, disorderly gathering, accident, wreck, explosion, or other emergency; and (5) the protection of persons and property. Every person present at the scene of such an occasion, shall comply with any necessary order or instruction of any police officer. No person shall enter such area or zone, unless duly authorized by the person in command on such an occasion; Provided, That bona fide representatives of the press and bona fide insurance adjusters or underwriters and such other persons as the Chief of Police may authorize to be within such space, and who shall have plainly exposed to view the press pass or fire pass described in this section, shall be permitted within the lines established by the Police Department under the conditions named in the following paragraph . . . .

of police discretion in functional terms is reasonable, and . . . meticulous specificity is not required." 566 F.2d at 119.

The case before us is equally clear. The authority to disperse is given by a statute that has specific purposes. The authority may be exercised, therefore, only when the police reasonably believe that a threat to the security or peace of the embassy is present. The dissent would not suggest, we are confident, that a court would sustain a conviction *under this statute* for refusal to disperse upon a policeman's order if the policeman had acted out of personal malice, to prevent the sidewalk sale of neckties, or in order to interrupt what he suspected to be a conversation contemplating the sale of drugs. It is not a question of requiring proof of an "abuse of power" before voiding this provision. Dissent at 46. We do not believe the provision grants police the power to disperse for reasons having nothing to do with the nearby embassy. In a word, the purposes of the statute supply the necessary criteria just as much as a "breach of the peace" ordinance does. The dissent refers to this as a "narrowing" construction, dissent at 42-43, but we think it is simply the most plausible construction, one following the unexceptional principle that statutes are construed in light of the purposes behind their enactment. The dissent insists upon giving the statute the most expansive construction conceivable, one unrelated to the legislative purpose. We can see no reason for doing so, aside from the fact that it is easier to attack the inflated version. The discretion given by section 22-1115, being cabined by the statute's purposes, is no broader than essential and is, therefore, constitutionally permissible.[17]

[17] The dissent states that we have ignored circuit precedent by reading the second clause of § 22-1115 as we do. The precedent to which the dissent refers is *Zaimi*, 476 F.2d at 515, in which we held that the second clause was functionally separate from the first. The dissent misunderstands our

C.

Appellants next contend that the statute is overbroad, and sufficiently so to require facial invalidation. The overbreadth doctrine in first amendment law has taken a number of different forms, none of which provides grounds for sustaining appellants' facial attack.

First, overbreadth constitutes an exception to traditional rules of standing, an exception applicable only in first amendment cases. Litigants to whom a statute is constitutionally applied cannot generally seek its invalidation because it infringes the rights of hypothetical individuals not before the court. In order to avoid the chilling effect of an overbroad regulation of speech, however, such a challenge will be permitted under the first amendment. *See, e.g., Schaumberg* v. *Citizens for Better Environment*, 444 U.S. 620 (1980).

Second, when the overbreadth of a statute is *substantial* with reference to its "plainly legitimate sweep," *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973), and a narrowing construction is unavailable, facial invalidation will be in order. Overbreadth thus serves as both a jurisdictional doctrine and as a substantive doctrine of first amendment law. In such cases, the fact that *some* of the activity regulated may constitutionally be subject to restrictions is insufficient to save the statute. *See, e.g., Coates* v. *Cincinnati*, 402 U.S. 611 (1971).

Third, where the party challenging the statute is *himself* engaged in protected speech which the overbroad

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analysis. We do not believe that the second clause is limited by the first, *i.e.*, that police may order dispersal only where the congregation is displaying signs of the sort described. Rather, we believe the provision is limited by the general purposes which motivated the enactment of the statute as a whole, *i.e.*, protection of the peace and security of the embassy. Dispersals may only be ordered in accord with those purposes.

statute seeks to punish, a court will follow the more traditional practice—invalidate the statute to the extent that it reaches protected conduct, while leaving the remainder intact. In such instances, the Court leaves in force that portion of the statute that regulates activity in a constitutionally permissible manner. *See, e.g., Brockett* v. *Spokane Arcades, Inc.*, 105 S. Ct. 2794 (1985).

While appellants regard their own planned activities as protected, they do not offer any limiting construction to this court. They seek instead a facial invalidation on grounds of overbreadth. The Supreme Court has characterized the facial invalidation of a statute because of overbreadth as "manifestly, strong medicine," to be employed "sparingly." *Broadrick* v. *Oklahoma*, 413 U.S. at 613. The Court has therefore held that "particularly where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. When the central requirement of substantiality is met, it is often because the statute contains a fundamentally illegitimate predicate for government action, or was premised on an unsupported assumption that purported to tie its means to its ends. For example, in *Coates* v. *Cincinnati*, the Supreme Court struck down a city ordinance forbidding three or more persons from assembling on a sidewalk and conducting themselves "in a manner annoying to persons passing by." 402 U.S. at 611. The statute was overbroad because, while many annoying activities—such as disturbance of the peace—could constitutionally be regulated, "mere public intolerance or animosity cannot be the basis" for such a law. *Id.* at 615. In *Schaumberg* v. *Citizens for a Better Environment*, an ordinance prohibiting street solicitations by charitable organizations that did not use at least 75% of their receipts for "charitable purposes" was invalid because—despite the fact that *some* of these organizations were undoubtedly sub-

ject to regulation—the percentage figure was not a relevant measure of the integrity of the organization, or the threat it posed to public safety or residential activity, which were the interests asserted to be at stake. 444 U.S. at 636. In such cases, what renders a statute's overbreadth substantial is that the error taints the entire provision—the statute "in *all* its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest." *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U.S. 947, 965-66 n.13 (1984) (emphasis added). Even when all its applications are not so tainted, a statute may be substantially overbroad when its potential for application to protected activity overwhelms its potential for application to unprotected activity.

Our analysis is guided by *Broadrick* v. *Oklahoma*, in which the Court explained:

> [T]he plain import of our cases is, at the very least, that *facial overbreadth adjudication is an exception to our traditional rules of practice* and that *its function, a limited one* at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. *Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect —at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.*

413 U.S. at 615 (emphasis added).

Appellants have not made anything like the showing of substantial overbreadth needed to justify a facial invalidation. They argue that the statute is overbroad because

> [i]t prohibits any form of peaceful expression by any member of the public who displays a sign designed to disagree with a foreign government's views. It goes so far as to prohibit anyone with an anti-Soviet lapel button from walking within 499 feet of the Soviet Embassy.

Brief for Plaintiffs-Appellants at 50-51.

Any statute that sets clear limits—and so avoids the charge of vagueness—will be subject to this sort of overbreadth attack. It might be noted that the statute does not apply when someone with an eight-foot, anti-Soviet sign stands 501 feet from the Soviet Embassy. The only cure for the kind of overbreadth appellants complain of would be a statute that carefully correlated the size of signs and lettering with the permissible degree of distance from the Embassy. The person wearing the lapel button might be allowed to go up to ten feet from the property while the person with the eight-foot sign might not be allowed within a thousand feet. The first amendment does not require such a complex and difficult-to-police sliding scale. Congress has made a reasonable attempt to balance the interests protected by the first amendment and the combined interests of United States foreign policy and obligations under international law. The balance struck is, as it should be, favorable to first amendment interests.

In addition to the need to ensure security, the other requirement imposed by the Vienna Convention—the maintenance of the peace and dignity of the embassy premises—is clearly contained within section 22-1115's "plainly legitimate sweep," and demonstrations, even those by lone protestors, may threaten fulfillment of that obligation without necessarily posing a threat of violence. Appellants thus offer us no real basis on which to con-

clude that section 22-1115 is overbroad or substantially so.[18]

D.

Appellants have offered one further argument meriting discussion—that the content-based restriction itself is not narrowly tailored to serving the interests at stake and is therefore unconstitutional.[19] Were we to accept this argument, we would have to strike the statute in its entirety. We can imagine other statutes, however, in which the element of content discrimination would be more neatly severable—statutes, for example, which exempt narrow categories of speech from regulations otherwise universally applicable.[20] In such instances, if the court

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[18] Appellants also contend that the statute is substantially overbroad because it regulates criticism of *any* foreign government in front of *any* foreign embassy. In other words, the statute, in appellants' view, prohibits an anti-Israel demonstration in front of the Syrian Embassy. We think this construction implausible in light of the purposes behind the provision's enactment. We think it in any event precisely the sort of challenge that ought to be made by an individual prevented from so demonstrating, and one which, if successful, would call for a limiting construction rather than facial invalidation. In the absence of any evidence that the statute has *ever* been applied in such a fashion, we will not entertain such a challenge now. *See Regan* v. *Time*, 468 U.S. at 649-52 (overbreadth challenge "unavailing" when there is "no evidence" that the statute will be interpreted as feared).

[19] Appellants also maintain that the exception to § 22-1115 for labor picketing, codified in § 22-1116, is an unconstitutional content-based restriction. We reject this argument for the reason given by the three-judge court in Jewish Defense League v. Washington, 347 F. Supp. 1300 (D.D.C. 1972).

[20] The law invalidated by the Supreme Court in Police Department of Chicago v. Mosley, 408 U.S. 92 (1972), was one such statute. It prohibited all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute. The Court held that the statute violated the equal protection clause, but never explained its decision to strike the statute rather than the exemption.

were to strike only the element of discrimination and leave a flat and neutral prohibition in place, it would be narrowly tailoring the statute by broadening its application—a peculiar outcome, but one that would end the equal protection problem. We note this anomaly to illustrate the potential clash between the first amendment doctrines of overbreadth and equality. As a legislature narrows a statute to ensure that no more speech is regulated than is absolutely necessary, it begins differentiating among types of speech activities. A total prohibition, in contrast, is the most neutral statute of all.

The differentiation at issue in this case is easy to justify. This statute was enacted in order to protect foreign embassies from the potential of violence, and threats to its peace and dignity, and to enhance the security of our own diplomats and citizens overseas. Demonstrations called to express support for foreign governments in front of their embassies simply do not threaten these interests. Congress was not obliged to regulate such demonstrations for the sake of symmetry, and its decision not to do so does not disable it from regulating demonstrations that *do* threaten these interests. It is precisely *because* this statute is narrowly tailored that it contains a content-based restriction. The content-based portion of section 22-1115 is thus tailored to serve two compelling interests simultaneously—it regulates expressive conduct that may threaten to undermine American compliance with international law and the safety of foreign and American diplomats, while leaving unregulated expressive conduct that does not. It would turn overbreadth analysis on its head to maintain that Congress is *required* to regulate more speech than necessary.

There is some force to the argument that a broad regulation which affects all speech equally raises fewer constitutional problems than one which regulates less aggregate speech but discriminates while doing so. At the very least, they raise different problems. However, the funda-

mental concern underlying the disfavored status accorded content-based restrictions is not implicated by section 22-1115. There is no "preferred view" the government is seeking to promote, nor a minority view it seeks to suppress. In fact, there is no single point of view targeted at all; under the most reasonable interpretation of the statute, *see supra* note 18, what is prohibited in front of the East German Embassy is permitted in front of the West German one, and vice versa.[21] We therefore do not

[21] In a declaration filed below, Father Finzer stated: "I . . . believe that my conservative colleagues and I are being discriminated against because of the nature of our political beliefs." Declaration of Father R. David Finzer at 5, R.E. at 19. Appellants have supplemented the record before us with a press release issued by the city government, entitled "District Drops Charges in South Africa Case." In this press release, District of Columbia Corporation Counsel Inez Smith Reid announced that the District would be dropping charges against five persons who crossed a police barricade during a demonstration at the South African Embassy. Ms. Reid said:

> It would be untenable for the Office of the Corporation Counsel to prosecute these five individuals who demonstrated peaceably to call attention to the gross injustices which result from the South African policy of apartheid. We are aware that the United States Attorney for the District of Columbia has dropped charges against several of those arrested at the South African Embassy. For us not to do so would set an inconsistent policy with respect to the prosecution of those arrested at the South African Embassy. Finally, no significant District of Columbia interest would be served by these prosecutions.

These five individuals were arrested pursuant to local laws, while those the U.S. Attorney decided not to prosecute had been arrested pursuant to § 22-1115.

We do not have before us any similar documents from the U.S. Attorney's office and we decline to speculate, absent substantial evidence, about its motives and rationales. We note, however, that a statute constitutional on its face may not be applied in an unconstitutional manner. Yick Wo v. Hopkins, 118 U.S. 356 (1886). The boundaries of prosecutorial discretion are quite wide, but they are not limitless. Oyler v. Boles,

find the distinction embodied in section 22-1115 troublesome, although it is indisputably content-based. A principle of international law that shields embassies from various forms of hostile activity is itself necessarily content-based. In order to protect the safety, peace and dignity of foreign embassies, Congress need not prohibit speech activities that it deems do not implicate such concerns, any more than a locality that wished to prohibit the shouting of "Fire!" in a crowded theatre would be constitutionally required to outlaw the shouting of "Encore" as well.[22]

VI.

The dissent's apocalyptic version of what is at stake here requires that we once more attempt to place this case in realistic perspective. The dissent argues as though the statute before us attempted the general suppression of entire categories of speech rather than merely preventing the offering of political insult within the immediate vicinity of a foreign embassy. The placard provision of the statute involves only the latter and, for that reason, the dissent's extensive quotations about the central role of the first amendment in our national life are, to say the least, disproportionate. This is simply not a statute that threatens "our free speech birthright," the "silencing of Americans in their views," the "distort[ion of] the mar-

368 U.S. 448, 456 (1962). Because the plaintiffs before us have not pressed a claim of selective prosecution, we offer no opinion on the constitutional issues such a claim might raise.

[22] The dissent misses the point of this analogy, dissent at 38-39 n.22, which is that when only one particular category of speech threatens the legitimate interest the legislature seeks to promote, other, nonthreatening categories need not necessarily be regulated as well. The dissent compares § 22-1115 to a law allowing theatre-goers to shout "Encore" but not "Boo." If shouting "Boo," but not "Encore," had the same effect as shouting "Fire," then the law could permissibly regulate the shouting of "Boo" and "Fire" while leaving "Encore" alone.

ketplace of ideas," or the "mutilat[ion of] 'the thinking process of the community.'" Dissent at 1, 21, 28. The excitement generated by such rhetoric is quite spurious in the context of the 500-foot radius in which this regulation operates.

The dissent objects to section 22-1115 on the ground that it bars only the carrying of hostile placards and not of supportive placards within 500 feet of an embassy. The ground for this objection is that the narrower prohibition distorts the marketplace of ideas by allowing the presentation of one side only.

This objection is entirely theoretical; indeed, if the word may be used in a pejorative sense, it is merely academic. There simply is not and never has been a problem with carriers of supportive placards. More to the point, there is not and never has been political debate about the merits of foreign governments and their policies within 500 feet of their embassies. The dissent's argument conjures up a picture of rival speakers at podiums before the Nicaraguan embassy while the nation watches. There is simply no reality in that picture. The debate about Nicaragua is carried on in innumerable fora in Washington and across the nation but no such debate has entered the marketplace of ideas and our nation's political process from the area bounded by a radius extending 500 feet from 1627 New Hampshire Avenue, N.W. If preventing Finzer from displaying a sign critical of the Sandinistas at that address has mutilated the thinking process of the community, the effect has not been noticeable.

In response, the dissent makes reference to the anti-apartheid demonstrators who have picketed the South African Embassy this last year, and to the significance of their protest in shaping the public debate. Dissent at 47-48. It is difficult to know what point the dissent seeks to make with this example. The "less restrictive" alternative favored by the dissent would have prohibited

those demonstrations as thoroughly as section 22-1115. The question is whether the public debate has in any way been warped out of shape because these demonstrations are prohibited and some wholly imaginary supportive demonstrations are not. To state the question is to answer it.

VII.

While we hold therefore that section 22-1115 is constitutional, we remand to the district court with instructions to make factual and legal findings with respect to one further issue. The Complaint and Declarations below contained allegations of incidents in which police officers, claiming to be enforcing section 22-1115, prevented some of the appellants from engaging in activity which section 22-1115 plainly does not proscribe. For example, Finzer claims to have been prevented from kneeling on the sidewalk directly in front of the Soviet Embassy to pray silently, Declaration of Father R. David Finzer at 2, R.E. at 16, and Brooker describes an occasion in which she was told she could not stand in front of the Soviet Embassy "to say the Lord's Prayer." Declaration of Bridget Brooker at 2, R.E. at 22. The record does not reveal the context in which these incidents took place, but we note that the first part of section 22-1115 applies only when a protestor is carrying a sign of some sort, and the second part applies only when a congregation of people has been ordered to disperse. *See Zaimi* v. *United States*, 476 F.2d 511 (D.C. Cir. 1973). If neither of these conditions applied, then the appellants were wrongfully prevented from conducting their protest. While the District of Columbia Corporation Counsel has indicated that appellants will not be prosecuted for such activity, Defendants' Statement of Material Facts in Dispute, R.E. at 34, we have no similar statement before us from the Office of the United States Attorney in Washington, D.C., which also has prosecutorial jurisdiction over these matters. If section 22-1115 has been interpreted to prohibit conduct that is in fact clearly beyond its scope, a de-

claratory judgment prohibiting official interference with activities outside its proper reach would be appropriate.

VIII.

We wish to reiterate, in conclusion, the special circumstances that surround the provision whose constitutionality we have upheld. It represents an exercise by Congress not simply of the police power, but of its authority and responsibility under the Constitution to impose upon citizens what it understands to be the obligations required by international law. It does not eliminate any point of view from our political discourse, but sets aside the space immediately surrounding foreign embassies as an area free from hostile protest. The unique restrictions imposed are justified by the unique interests that are at stake, interests which include the safety of American personnel living abroad in a time in which international incidents provide regular reminders of the precariousness of their position. We think Congress acted within its authority when it required that these demonstrations take place elsewhere in the District. We therefore affirm the constitutionality of section 22-1115, and remand this case to the district court for a determination of whether the local authorities have exceeded the scope of their statutory authority.

It is so ordered.

WALD, *Chief Judge*, dissenting: Perhaps no two national interests engender so much deserved passion as the security of our citizens at home and abroad and the freedom of these same citizens to speak out on issues of public importance. Recent times have, unfortunately, taught us that we cannot always have a full measure of both. But even within the shadow of treachery and terrorism, we must not too hastily surrender our free speech birthright to phantom national security interests and international obligations. We must at the least demand reasonable proof that genuine issues of security or treaty obligations are implicated. The survival of our most cherished freedoms in time of trial requires that courts carefully scrutinize the strength of competing foreign relations and free speech interests and ensure that the "delicate balance" is rightly struck.

Everyone involved in this case is all too cognizant of the dangers right now facing our embassies abroad and the embassies of foreign sovereigns in our own country. I would be reluctant to challenge the validity of a 100 or even a 500 foot ban on picketing or demonstrating in front of an embassy based on genuine security concerns. That is not, however, what is involved in this case. This case involves the discriminatory application of a ban to some demonstrators but not others, based not on the need to protect the embassy's security but on the more amorphous need to prevent affronts to the "dignity" of the embassy.

I realize, too, that we must inevitably defer to the superior knowledge and responsibilities of the political branches of our government on the risks involved in certain courses of conduct in foreign affairs. But I am equally convinced that we must adamantly protect free speech and the right to express political dissent, not just about our own country's but about other countries' policies. Debate over such essential matters must not be unnecessarily restricted, particularly if there is no off-

setting gain to security at home and abroad. To permit fears of irrational behavior by others to so dominate our thinking that we do not insist on proof that substantial restrictions on free speech are in fact required by "national interests and international obligations," maj. op. at 8, presents risks to our basic freedoms that are more deadly than any terrorists' blows.

A painstaking assessment of the plaintiffs' facial attack on the constitutionality of this statute leads me to conclude that parts of it violate the first amendment. The majority makes an eloquent case for upholding the statute in its entirety because Congress [1] and the execu-

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[1] The majority speaks often and fondly of the need to defer to Congress' balancing of free speech interests and the dictates of the Law of Nations, but acknowledges that the balance reached in 1937, before any of the relevant Supreme Court decisions on content-discrimination issued, must be reassessed in light of those dramatic changes in first amendment jurisprudence. *See* maj. op. at 7.

Recent congressional action in the area casts doubts on whether today's Congress agrees that D.C. Code § 22-1115 reflects the right constitutional balance. From 1972 to 1976, the statute that governs embassies in the fifty states penalized anyone who

> (1) parades, pickets, displays any flag, banner, sign, placard, or device, or utters any word, phrase, sound or noise, for the purpose of intimidating, coercing, threatening, or harassing any foreign official or obstructing him in the performance of his duties, or
>
> (2) congregates with two or more persons with the intent to perform any of the aforesaid acts.

18 U.S.C. § 112. In 1976, however, Congress amended § 112 to eliminate the prohibition on banners, signs, placards, or devices. The amendment was explained on the ground that the old statute "raises serious Constitutional questions because it appears to include within its purview conduct and speech protected by the First Amendment." H.R. Rep. No. 1614, 94th Cong., 2d Sess. 6 n.9, *reprinted in* 1976 U.S. Code Cong. & Ad. News 4480, 4484 n.9; S. Rep. No. 1273, 94th Cong., 2d Sess. 8 n.9 (1976). Thus, even though the pre-amendment § 112 was far less restrictive of speech than D.C. Code § 22-1115 is, Congress thought it necessary to amend it to conform with the dictates of the first amendment.

This post-enactment history is not, of course, *evidence* of how Congress feels about the D.C. Code provision's constitutionality. It is *evidence*, however, that Congress has reevaluated the proper balance between embassy security and first amendment interests and that the 1937 statute, now part of the local District of Columbia Code, may no longer reflect Congress' current views as to where that balance lies. *See infra* at 17 n.10.

tive, the branches charged with protecting foreign countries' presence here and our own citizens abroad, have approved it. It is inappropriate, the majority argues, for the judiciary to scrutinize too severely the decision of those branches that this particular law is "necessary to fulfill our obligations." Maj. op. at 18. Summing up its case for superdeference, the opinion concludes that

> a court cannot lightly dispute a determination by the political branches that the statute meets important international obligations, that the interests at stake are compelling, or that those interests cannot be met by a statute with a more narrow reach.

Id.

The majority's warning is intimidating but, like much of the free speech/national security debate, assumes that a choice rather than an accommodation must be made between the two goals. Although the majority rightly identifies the core issue in this case as the need to strike a permissible accommodation "between the United States' national interests and international obligations and the first amendment's guarantee of free speech," maj. op. at 8, the only accommodation it recognizes as legitimate is that struck by Congress or the executive. It is too willing, in my view, to sacrifice first amendment freedoms to

the *generality* of political decisionmaking in the area of foreign affairs without carefully inquiring whether international obligations and national security concerns are really implicated at all, and if they are, whether the statute fulfills those interests with the least amount of intrusion into cherished constitutional rights.

Thus, the fatal flaws I see in the statute and in the District Court's decision summarily upholding it *have nothing to do* with the degree of deference we must give to the assessments of the other branches on matters of foreign affairs. Rather, they involve quintessentially legal judgments about accommodating one aspect of the Law of Nations, relating to "appropriate" safeguarding of an embassy's "dignity," with the dictates of first amendment law, already established in Supreme Court decisions. I am, to paraphrase a recent Supreme Court pronouncement on deference in the context of foreign affairs,

> cognizant of the interplay between [this case] and the conduct of this Nation's foreign relations, and [I] recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the judiciary's characteristic roles is to interpret [that document], and [I] cannot shirk this responsibility merely because our decision may have significant political overtones.

Japan Whaling Association v. *American Cetacean Society*, 54 U.S.L.W. 4929, 4931 (June 30, 1986). There is still room for the courts to levy "severe scrutiny" before upholding a law which on first glance looks like a classic, textbook example of prohibited viewpoint discrimination and unbridled police discretion.

D.C. Code § 22-1115 suffers from numerous constitutional infirmities. Section I sets out the standards that are used in analyzing content-based speech restrictions and establishes that the majority's reliance on the Law of Nations does not alter those standards in any significant way. Section II reviews the interests that the government relies on to justify the statute, and concludes that the only "compelling" interests involved in this case are those related to security; protecting the "dignity" of embassies, unless it can be directly tied into a security interest, cannot justify a content-based distinction. Section III tests the statute against the D.C. government's asserted security interest, and demonstrates that the statute is both fatally overinclusive and underinclusive. Moreover, even if its fit with those security interests were tighter, its viewpoint discrimination would still be constitutionally unjustifiable since a viewpoint-neutral regulation is readily available that would advance legitimate security interests in a manner far less restrictive of free speech values. Finally, Section IV turns to the second clause of the statute and concludes that its vesting in police officers of standardless discretion to disperse a congregating group is facially unconstitutional.

I. The Appropriate Standard of Scrutiny

A. *Content-Based Distinctions*

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department* v. *Mosley*, 408 U.S. 92, 95 (1972). Unlike content-neutral time, place, or manner restrictions where the government has a relatively light burden to carry in justifying regulation, the government has an exceptionally heavy burden to bear when it seeks to justify a content-based restriction on speech. *See Regan* v. *Time, Inc.*, 468 U.S. 641 (1984); *Widmar* v. *Vincent*, 454 U.S. 263, 270 (1981); *Police Department* v. *Mosley*, 408 U.S. 92 (1972). The government must demonstrate that the statute "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Education Association* v.

Perry Local Educators' Association, 460 U.S. 37, 45 (1983). As part of the "necessary" and "narrowly drawn" inquiries, the government must show that "no adequate alternative" exists that would be less restrictive of speech.[2] *Carey* v. *Brown*, 447 U.S. 455, 465 (1980). *See also Gay Student Services* v. *Texas A&M University*, 737 F.2d 1317, 1331 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 1860 (1985); *Frumer* v. *Cheltenham Township*, 709 F.2d 874, 877 (3d Cir. 1983). In short, whenever the government has regulated speech on the basis of content, the Court has applied the "most exacting scrutiny," *Widmar*, 454 U.S. at 276, "to determine whether there is any method of achieving the state's . . . purposes . . . which has a lesser effect on protected expression." *Tacynec* v. *City of Philadelphia*, 687 F.2d 793, 798 (3d Cir. 1982), *cert. denied*, 459 U.S. 1172 (1983).

There is no doubt that D.C. Code § 22-1115 is a content-based statute.[3] It prohibits only demonstrations in-

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[2] "The term 'narrowly tailored,' so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration whether lawful alternative and less restrictive means could have been used." Wygant v. Jackson Board of Education, 106 S. Ct. 1842, 1850 n.6 (1986) (Powell, J., plurality opinion).

By contrast, the Supreme Court has instructed that "less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a [content-neutral] *time, place, and manner regulation*. It is enough that the . . . restriction substantially serves the Government's legitimate ends." Regan v. Time, Inc., 468 U.S. 641, 657 (1984) (emphasis added); *see also* White House Vigil for ERA Committee v. Clark, 746 F.2d 1518, 1528-29 (D.C. Cir. 1984) (refusing to apply least-restrictive-alternative analysis to content-neutral time, place, and manner restriction).

[3] Indeed, even more threatening to our constitutional values, it is a viewpoint-based statute. *See infra* at 33-41.

volving signs[4] that hold the foreign government up to public odium or disrepute, while allowing signs that do not. In their briefs and arguments before this court, "[n]either appellees nor amicus dispute[d] the fact that § 22-1115 is a content based act." Brief for Amicus Curiae United States of America at 16. The majority recognizes this.[5] *See* maj. op. at 49.

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[4] The first clause of the statute encompasses "any flag, banner, placard, or device." For convenience sake, I shall refer to this entire class as signs.

[5] The majority suggests, however, that under City of Renton v. Playtime Theatres, Inc., 106 S. Ct. 925 (1986), "§ 22-1115 may not in fact qualify as a content-based statute." Maj. op. at 38 n.15. In that case, the Supreme Court held that zoning of adult theatres designed to "protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views," did not trigger the scrutiny reserved for typical content-based regulations. 106 S. Ct. at 929. The Court found the "resolution of [the] case largely dictated by [the] decision in Young v. American Mini Theatres, Inc., [427 U.S. 50 (1976)]." *Renton* and *Young*, however, are obviously and dramatically different from the case at bar.

In upholding the Renton ordinance, the Court stressed that the "ordinance does not contravene the fundamental principle that underlies our concern about 'content-based' speech regulations: that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.'" *Id.* at 929 (quoting *Mosley*, 408 U.S. at 95-96; *see also Young*, 427 U.S. at 67-68 (opinion of Stevens, J.). In this case, the government has done just that. Unlike the Renton ordinance, D.C. Code § 22-1115 turns on the viewpoint of the speaker, and there can be no denying that one of the predominant reasons for the restriction is to prohibit the airing of views that are disfavored by those occupying foreign embassies. *See infra* at 33.

The fact that the statute was indeed enacted in order to shield foreign emissaries from the content of speech eliminates any analogy to *Renton* where the Court held that the

B. *The Law of Nations*

Before proceeding to analyze the "compelling" interests advanced by the D.C. government in support of the statute, I will address the linchpin in the majority's rationale for upholding the statute: that the United States has a special duty under the customary Law of Nations and Article 22 of the Vienna Convention on Diplomatic Relations "to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity." 23 U.S.T. 3227, 3237, T.I.A.S. No. 7502; *see* maj. op. at 14. The opinion cites Senator Pittman, the sponsor of

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ordinance was only aimed at "secondary effects." 106 S. Ct. at 929. Here, a major part of the perceived evil is the content of the speech itself, and the emotive impact of it. If listeners' reaction to the content of speech is deemed to be a "secondary" effect, then there is nothing left at all of the content-based distinction doctrine. Yet, on the day it decided *Renton*, the Court also issued its decision in Pacific Gas & Electric Co. v. Public Utilities Commission, 106 S. Ct. 903 (1986), in which it reaffirmed the content doctrine. *Id.* at 914 ("For a time, place, or manner regulation to be valid, it must be neutral as to the content of the speech to be regulated.").

Finally, it is important to keep in mind that *Renton* was dealing with the issue of adult theatres. For good or for bad, the Supreme Court has adopted the view that not all speech is privy to the same protection. As Justice Stevens explained in *Young*, "[w]hether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice." 427 U.S. at 70. Along the continuum, there can be no doubt that political speech, such as that abridged in this case, is entitled to the utmost protection. *See* Brown v. Hartlage, 456 U.S. 45, 52 (1982); *In re* Primus, 436 U.S. 412, 437-38. *See generally* Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 20 (1971).

§ 22-1115, as relying on the Law of Nations for the obligation of a host country to protect a foreign embassy against not only physical invasion but "an offensive demonstration . . . not only against insult, but against any character of annoyance or interference that will bring the hatred of the people of his country against our people." *See* maj. op. at 13.

Senator Pittman's rhetorical protectorate is a tall order indeed and, if taken literally, would include a ban against offensive editorials in the local newspapers as well as critical citizens parading in front of the embassy. The Vienna Convention is, after all, not limited to the "premises" of the embassy but prohibits any "impairment of its dignity," *see supra* at 8, presumably referring to the dignity of a nation or its officials, not a building. Yet it is quite clear that the Law of Nations embodies no such requirement. The United States government has often cited the constitutional limitations on its ability to curtail freedom of expression in response to complaints by foreign embassies of insult or annoyance by American citizens. In the 1930s, the Constitution was invoked to fend off requests by the German government to stop the showing of an anti-Hitler film in Chicago and to prevent a mock trial of Hitler from taking place in Madison Square Garden. In 1941, the Egyptian prime minister complained to the United States about an article in *Foreign Affairs* calling the King of Egypt a "quisling," but was mollified by our government's explanation that it could do nothing but apologize since its Constitution contains guarantees of freedom of the press. M. Whiteman, 5 *Digest of International Law* 160-62, 168 (1965).

Our government has similarly invoked the first amendment in response to complaints of insult stemming from protected activities in the vicinity of foreign missions and consulates. When, in 1958, the Soviet delegation to the United Nations complained about a demonstration in front of its building, the United States declined to take

action, explaining that it could not "associate itself with any attempts to abrogate the constitutional rights of residents of the United States to gather in peaceful assembly and to express their beliefs and convictions." M. Whiteman, *supra*, Vol. 7 at 385 (1970). Several years later, the United States again rebuffed a Soviet complaint, contending that no principles of international law were violated when a synagogue across the street from the Soviet mission erected a plaque pointedly referring to "the cry of the oppressed . . . Jewish Community in the Soviet Union." *Id.* at 384. More recently, in 1979, the United States refused to act when the Soviets complained about demonstrations near their San Francisco consulate, noting that the protest was peaceful and legal under 18 U.S.C. § 112. M. Nash, *Digest of United States Practice in International Law* 674 (1979).

Under the majority's broad brush analysis of the relationship between the Law of Nations and the first amendment, the United States probably could and indeed should have taken all of the requested actions. Its refusal to do so suggests that its officials entertain, as I do, serious doubts about "the framers['] understanding that the protection of foreign embassies from insult was one of the central obligations of the law of nations." Maj. op. at 12.[6] At a minimum, these tolerated insults and annoyances visited upon foreign diplomats by United States citizens clearly illustrate that our government's obligations under the Law of Nations are not as rigidly circumscribed as Senator Pittman and the majority would have us believe. The mere fact that the United States' obligation is flexible does not, of course, mean that it is not compelling, *cf.* maj. op. at 29, but does indicate that

[6] Many of the majority's examples—protections against acts of violence such as the tearing down of flags or tumultuous riots—are readily recognized as involving our government's obligations to protect the embassy's security rather than its dignity. *See* maj. op. at 8-12.

first amendment interests can be accommodated under the Law of Nations without imposing the constitutionally dubious strictures of § 22-1115.

The reasonableness and flexibility of the Law of Nations is further illustrated by the quite temperate language of Article 22 of the Vienna Convention, the obligations of which are purportedly fulfilled in part by § 22-1115. Article 22 provides only that governments have a "special duty" to take "appropriate" steps to protect the peace and dignity of the mission. 23 U.S.T. 3227, 3237, T.I.A.S. No. 7502. The commentary on the draft of this Article states that "in order to fulfil this obligation [a government must] take special measures—over and above those it takes to discharge its general duty of ensuring order." M. Whiteman, *supra*, Vol. 7 at 373 (1970). There is nothing in this language to indicate that consideration of what is "appropriate" should not encompass consideration of what is constitutional. *See infra* at 17 & n.10.

Article I, § 8 of the Constitution enumerates the areas within which Congress is generally authorized to act. As part of an extensive list, clause 10 provides that Congress has the power "[t]o define and punish . . . Offences against the Law of Nations." Congress certainly may draw on Article I's Law of Nations clause for its general authority to enact D.C. Code § 22-1115. But that being said, the Law of Nations does not answer the question of whether Congress, in enacting some of the provisions of § 22-1115, has violated the first amendment's provision that "Congress shall make no law . . . abridging the freedom of speech." The Law of Nations clause, like the commerce clause or any other source of congressional authority, can be exercised only subject to express limitations found elsewhere in the Constitution.

Indeed, the majority opinion, after a nine-page discourse on the Law of Nations, finally recognizes this ultimate legal truth and concedes that "[t]he presence of a

first amendment claim requires that the court examine the balance struck by the political branches," maj. op. at 18-19, although only after admonishing that the examination must be conducted with superdeference to the conclusions of the political branches. The majority's attempt to lean so heavily and for so long on the Law of Nations to justify a statute that it implies might otherwise violate the first amendment is constitutionally troublesome, to say the least. *See* maj. op. at 24 (the issue in this case is fundamentally "a question of living up to our obligations under international law and a treaty").

The Supreme Court has made clear that principles of international law and treaties cannot supersede our Constitution. In *Reid* v. *Covert*, 354 U.S. 1 (1957), the Court explained that "[i]f our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes." *Id.* at 14. The Court found it "obvious" that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Id.* at 16. *See also Geofroy* v. *Riggs*, 133 U.S. 258, 267 (1890), ("It would not be contended that [the treaty power] extends so far as to authorize what the Constitution forbids."). Similarly, the most recent Restatement of Foreign Relations Law explains that "rules of international law and provisions of international agreements of the United States are subject to the Bill of Rights and other prohibitions, restrictions or requirements of the Constitution and cannot be given effect in violation of them." Restatement of Foreign Relations Law § 131 comment a (Tent. Final Draft, July 15, 1985); *see also* L. Henkin, *Foreign Affairs and the Constitution* 251-54 (1972).

While invocation of congressional authority to punish offenses against the Law of Nations cannot override the

first amendment, the concerns embodied in the Law of Nations can be evaluated to determine whether they rise to the level of "compelling interests" which warrant narrowly tailored restrictions on free speech. Just as "the nature and extent of first amendment rights may vary with the location at which their exercise is sought," maj. op. at 23, the nature of an embassy and our responsibilities as international hosts weigh in the balance as to what is permissible regulation of free speech in that particular place. *See* L. Henkin, *supra*, at 254 ("One may expect that the national interest in war and peace and even lesser concerns of foreign relations would have important weight in any balance."). Contrary to the majority's suggestion, I do not "overlook[] that other law sometimes expresses values and concerns that are of legitimate constitutional dimension." Maj. op. at 27. I examine both the dignity and security interests protected by the Law of Nations. *See infra* at 14-21.

The Law of Nations, standing alone, does not, however, constitute an automatic "compelling interest" which justifies any limitation on free speech in the vicinity of embassies. Because I do not believe there is a compelling interest to weigh here, I fail to see how my analysis can be characterized as an "all-or-nothing" approach to first amendment balancing of "competing constitutional values." *Cf.* maj. op. at 28-29. Simply because an interest is recognized in the compendious Law of Nations does not confer upon it the status of a compelling interest that must override any other constitutional guarantee. To say that it does would be to recognize *de facto* the Law of Nations as superior to the Constitution—a result which has been soundly rejected by the Supreme Court. We would agree, I presume, that no law could forbid black persons from demonstrating in front of embassies of countries that officially practice segregation on the grounds that it would "insult" them or be offensive to their dignity.

A treaty, like any other statute, represents Congress' assessment of the national interest. In reviewing both treaties and statutes against first amendment challenges, the court may not simply defer to that congressional judgment. To the contrary, the Supreme Court has instructed that the defender of any such law or regulation restricting free speech, be it of congressional or state origin, has the affirmative burden of proving its constitutionality. *See Philadelphia Newspapers, Inc.* v. *Hepps*, 106 S. Ct. 1558, 1564 (1986). Legislative enactments of content-based speech restrictions have always been subjected to more severe scrutiny than other laws. In these supersensitive first amendment areas, the mere fact that Congress passed the act in the first place simply does not weigh in so heavily as it does in other kinds of constitutional inquiries. Resort to the Law of Nations cannot short-cut the arduous process of constitutional adjudication that requires a careful assessment of the particularized justification for any law that impinges free speech as severely as this one does. We must ask whether the abridgement is truly "necessary" to attain a compelling interest, and even if it is, whether it has been crafted in a way to restrict as few fundamental rights as possible. On this record, both questions must be answered with a resounding "No."

II. The Asserted Interests

The D.C. government asserts that D.C. Code § 22-1115 serves two separate compelling interests: first, it directly protects the security of foreign embassies and thereby it indirectly protects the security of our own embassies in foreign countries. Second, it helps preserve foreign embassies' dignity by shielding them from the insult of demonstrations that hold their governments up to public odium or disrepute. Our task is to decide whether these asserted interests are sufficiently compelling to justify overriding the free speech interests of citizen demonstrators.

A. *Security Interest*

Our government has a unique and compelling interest in maintaining security for foreign embassies in Washington and in making efforts to increase the security of United States embassies abroad. Accordingly, statutory prohibitions must be upheld if they can be shown to be directly tied to these security interests[7] and properly crafted to advance these interests with minimal restrictions on free speech. Such security interests have been held to be important enough to justify content-neutral restrictions on speech in the vicinity of embassies and missions. *CISPES* v. *FBI*, 770 F.2d 468, 472-75 (5th Cir. 1985); *Concerned Jewish Youth* v. *McGuire*, 621 F.2d 471, 474-76 (2d Cir. 1980), *cert. denied*, 450 U.S. 913 (1981). But the majority and I agree that the security interest cannot justify much of the content-based statute before us. *See infra* at 22-27. Hence, we must look to some other interest which may serve to explain the statute's prohibitions. The government asserts that its interest in preserving the "dignity" of the embassies so qualifies.

B. *"Dignity" Interest*

It is not at all apparent that the D.C. government's asserted interest in preserving foreign embassies' "dignity" is a compelling interest capable of overriding the

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[7] Because I find no demonstrated connection between the hostile sign prohibition and the fear of foreign retaliation in this case, I need not decide whether fear of a foreign government's actions in response to peaceful criticism may ever justify infringement of an American citizen's constitutional rights. I admit to grave concerns about the degree or circumstances under which a foreign government's threats, through a grand-scale heckler's veto, can justify abridgement of constitutional rights. An admittedly extreme example makes the point: if some foreign country threatened to attack Americans abroad unless we rescind voting rights for blacks in the United States, that could hardly justify such discrimination.

constitutional guarantee of free speech. The courts in *CISPES* and *Concerned Jewish Youth* relied solely on security interests to affirm content-neutral speech prohibitions in the vicinity of consulates and missions, making no reference to the dignity interest asserted here. The majority nonetheless accepts, without question or analysis, the government's assertion that the statute is valid because it protects foreign embassies from the "insult" of being exposed to signs that oppose their governments' policies. The majority's calculus is that (a) since preservation of the dignity of embassies is required by the Law of Nations and (b) since the sign restriction is somehow related to the preservation of the dignity of the embassies, then (c) the sign restriction passes constitutional muster.[8]

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[8] At another point the majority argues that the "dignity" interest must be accepted as compelling because "a court cannot lightly dispute a determination by the political branches . . . that the interests at stake are compelling." Maj. op. at 18. The majority never explains, however, which political branch made this determination, and when they made it. Was Congress so omniscient that in 1937 it could anticipate future developments in first amendment law and carry out analyses that had not yet been developed? The fact is that recent congressional action casts doubt about whether Congress still thinks that the statute reaches a correct constitutional balance. *See supra* note 1. Thus, even if this notion of super-deference had a role to play in compelling interest scrutiny, there is no support for it in this case.

More generally, where the Supreme Court has desired lower courts to modify their usual methods of review in first amendment cases, it has clearly told us so. *See* Goldman v. Weinberger, 106 S. Ct. 1310, 1313 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."). Deference to the political branches is not otherwise as broad in the first amendment context as in some other areas, even when issues of foreign affairs are involved. *See supra* at 14; New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam).

The majority's reasoning grossly misstates the relevance of the Law of Nations to this case. While the Law of Nations does impose some obligation to protect the dignity of foreign embassies, that obligation is flexible and does not require protection from all insult, especially at the expense of constitutional guarantees. *See supra* at 9-11. In enacting protection for foreign emissaries outside the District of Columbia, for example, Congress has managed to fulfill its obligations to protect the dignity and security of foreign officials through the use of criminal penalties punishing harassment and through other content-neutral restrictions.[9] *See* 18 U.S.C. § 112 (1982). Certainly the Law of Nations does not have a special District of Columbia provision imposing extra duties on host governments here.[10]

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[9] The statute punishes whoever congregates with two or more other persons within one hundred feet of a listed diplomatic building with intent to "intimidate[], coerce[], threaten[], or harass[] a foreign official or an official guest or obstruct[] a foreign official in the performance of his duties." Relying on the complete content-neutrality of the statute, and only on the government's asserted security interest, the Fifth Circuit held in *CISPES* that the statute was constitutionally permissible. 770 F.2d at 472-75.

[10] Despite the majority's attempts to vest the "dignity" interest with a congressional imprimatur, Congress' post-Vienna Convention enactments dealing with consulates and missions outside the District of Columbia have been far less concerned with protecting foreign emissaries against insult and far more sensitive to first amendment values than § 22-1115. Despite the long-standing nature of the Law of Nations' alleged concern with protecting embassies from annoyance and insult, until 1972 the only statutory protection afforded foreign diplomats outside D.C. was against violent acts. *See* 18 U.S.C.A. § 112 (1969). In 1972 the statute was amended to restrict harassing demonstrations near embassies in order "to protect the peace, dignity and security of foreign officials." S. Rep. No. 1105, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4316, 4328; *see supra* at 2 n.1. The Senate was concerned about the first amendment implications of this prohibition, however, and added a provision to the

I cannot accept the majority's conclusion that the preservation of an embassy's dignity is such a compelling interest that it can justify the content-based restriction on speech embodied in this statute. Settled first amendment principles establish that shielding listeners from hearing things they find offensive or politically distasteful is not an interest capable of supporting suppression of protected speech. Even crude, vile, or sexually explicit speech may not generally be forbidden because of its communicative impact. *See Bethel School District No. 403* v. *Fraser*, 54 U.S.L.W. 5054, 5056 (July 7, 1986) ("use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point"); *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 71-72 (1983) (rejecting "offensiveness" interest even where less protected, commercial speech is involved); *Cohen* v. *California*, 403 U.S. 15, 21 (1971) ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy

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final bill, still codified at 18 U.S.C. § 112(d) (1982), explaining that "[n]othing contained in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the first amendment to the Constitution of the United States." *Id., reprinted in* 1972 U.S. Code Cong. & Ad. News at 4330. Congress remained concerned about the free speech implications of its actions, however, and when it revisited § 112 four years later it repealed the picketing provisions, citing constitutional concerns. *See supra* at 2 n.1. Congress is presumably satisfied that 18 U.S.C. § 112 fulfills its duties under the Vienna Convention, even though it no longer contains anything remotely like the restrictions embodied in § 22-1115 and expressly directs that it be interpreted so as not to abridge first amendment rights. This congressional pronouncement is far more persuasive on the requirements of the Law of Nations and the Vienna Convention and their relation to the first amendment than the decades-old provisions of § 22-1115, enacted before the Vienna Convention and many of the important developments in first amendment law.

interests are being invaded in an essentially intolerable manner."); *Coates* v. *City of Cincinnati*, 402 U.S. 611, 615 (1971) ("Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms.").

How much stronger the impediment when the offensiveness of the speech is based on the fact that the audience disagrees with the political message of the speaker. *See Street* v. *New York*, 394 U.S. 576, 592 (1969). As the Supreme Court has recognized,

> a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . ., is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

Terminiello v. *Chicago*, 337 U.S. 1, 4 (1949). So precious is our freedom of speech that courts have felt compelled to protect politically oriented exercises of free speech as offensive, and potentially inflammatory, as Nazi marches and Ku Klux Klan rallies. *See Collin* v. *Smith*, 578 F.2d 1197 (7th Cir.) (Nazi rally in Skokie, Illinois), *cert. denied*, 439 U.S. 916 (1978); *Knights of Ku Klux Klan* v. *East Baton Rouge Parish School Board*, 578 F.2d 1122 (5th Cir. 1978) (Ku Klux Klan rally). The Supreme Court has held that the first amendment even requires states to tolerate advocacy of the use of force or of law violations except "where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action." *Brandenburg* v.

Ohio, 395 U.S. 444, 447 (1969) (emphasis added); *see also Hess* v. *Indiana*, 414 U.S. 105, 108 (1973) (per curiam).

The government nonetheless asks us to break new doctrinal ground here and to recognize a compelling interest in shielding foreign emissaries from speech which they find offensive because of its political content.[11] The majority asserts that because foreign officials have no obligation to be accessible to public protest or to participate in the clash of ideas central to our democratic process, the general ban against censoring unpopular speech is inapposite here. Maj. op. at 23, 34. I disagree. This key first amendment principle is based on the need to protect the rights of the *speaker* and so its application does not generally turn on the type of *listener* involved.[12] Furthermore, there can be no clear-cut division between foreign and domestic political debate—limiting speech addressed to foreign embassies *will* inevitably affect the competition of ideas in the United States. Current anti-apartheid protests in front of the South African embassy are very

[11] This is not a case, like those cited by the majority, maj. op. at 23, where the nature of the demonstration site is functionally incompatible with free speech. We are dealing here with public sidewalks. First, no aesthetic or traffic rationale has been set forth for the sign ban. If one had, then presumably signs in support of the embassy's government would be equally forbidden. *See* Adderley v. Florida, 385 U.S. 39 (1966) (upholding content-neutral regulation of speech on jail premises). Nor is this a case like Cox v. Louisiana, 379 U.S. 559 (1965), where the explicit constitutional value of preserving fair trials justified a viewpoint-neutral restriction that prohibited expression *designed to influence* judicial proceedings in the vicinity of a courthouse.

[12] The Court has created an exception when the audience is schoolchildren. *Bethel School District*, 54 U.S.L.W. at 5056. Foreign emissaries are not, like America's youth, in need of civic training or special protection from sexually explicit speech. Neither does the Law of Nations constitute them as a class apart, entitled to exercise a heckler's veto in violation of constitutional principles. *Cf. supra* at 15 n.7.

much a part of the domestic political debate about appropriate United States responses to the South African regime.

The notion that the Law of Nations permits or requires silencing of Americans in their views on foreign governments' policies to avoid assault on the dignity of the embassy is too radical a departure from recognized first amendment principles to be accepted on the D.C. government's or the majority's say-so. If the protection of a foreign emissary's dignity is as compelling an interest as the majority believes, how can the ban on criticism be limited to an area within 500 feet of an embassy? Surely if the dignity interest is so compelling, and its compelling nature is evaluated under the majority's superdeferential standards, there is nothing to prevent suppression of insulting speech in many other forms and locations. These worrisome implications of the majority's dignity rationale make this truly a case about "the general suppression of entire categories of speech rather than merely preventing the offering of political insult within the immediate vicinity of a foreign embassy." Maj. op. at 51.

Only if the District can show some interest that transcends the foreign government's sensitivity to insult in response to peaceful picketing would the first amendment allow suppression of political expression by American citizens. That interest could logically only be threats to the security of the embassy and its personnel or a threat of retaliation to our citizens and embassies abroad.

III. Custom Tailoring

In addition to showing that any content-based restriction on speech is supported by a compelling governmental interest, the government must also demonstrate that the restriction is not only narrowly tailored to achieve that

interest, but is the least restrictive alternative available. *See supra* at 5-7. The statute "in issue here is fatally overinclusive in some respects and fatally underinclusive in others." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 218 (1975) (Douglas, J., concurring). The statute is overinclusive because no compelling interest in maintaining security has been shown to justify a prohibition on signs; it is underinclusive because a prohibition directed solely to anti-embassy speech cannot be justified when pro-embassy speech is likely to pose many of the same security risks. Moreover, even if the statute's viewpoint-discriminatory restriction were demonstrably related to the proffered security interests, the only constitutionally acceptable solution would be to create a viewpoint-neutral time, place, or manner restriction, *i.e.*, relegating both pro- and anti-foreign government viewpoints to a forum outside of the 500 foot zone.

A. *Overinclusiveness*

As discussed in Section II, the only compelling interest that could justify the free speech restriction of this statute is security. However, while the second clause of the statute—the congregating prohibition—is readily recognizable as a security measure, there is no evidence whatsoever in the record to support on security grounds the restriction of the first clause, which allows demonstrators within 500 feet of the embassy provided that they do not hold signs that hold the embassy's government or officers up to "public odium" or "public disrepute."

The State Department affidavits assure us that "not all demonstrations are prohibited under section 22-1115. Vigils or protests which do not involve the use of placards or banners, and leafletting when the handout is not facially 'odious' are allowed so long as the demonstrators do not congregate within the '500 foot' perimeter." *See* Affidavit of Deputy Chief John C. Connor, J.A. at 51

(discussing candlelight vigil that was deemed permissible); Defendants' Statement of Material Facts as to Which There is No Genuine Issue, point 7. Nothing in the record explains how or why this *restriction on certain kinds of signs* is related to the government's interest in maintaining embassy *security*. There is, for example, no claim, as there certainly was in *White House Vigil for ERA Committee* v. *Clark*, 746 F.2d 1518 (D.C. Cir. 1984), that the sign restrictions are necessary to preserve visibility for security reasons or to prevent their use as weapons. *Id.* at 1532-34. The majority admits that "a law prohibiting a lone protester carrying a sign of any sort bears no relation to safeguarding the physical security of the building and its occupants. The only conceivable interest that would support such a restriction of speech is that of dignity and peace." Maj. op. at 33.[13]

Since I do not believe that this statute can be upheld merely because it protects embassies from insult, the only constitutionally acceptable justification for upholding the controversial sign provisions of the statute is that countries offended by hostile demonstrators might turn face and refuse to protect our embassies or citizens abroad.[14] Indeed, the majority repeatedly hammers home this appalling spectre. Yet it is worth noting that none of the affidavits provided by the State Department and Secret Service representatives ever assert a direct link between our protecting foreign embassies from *insult* and the *se-*

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[13] The majority explains that

> the *first part of the statute*—requiring a permit for the display of a sign tending to bring a foreign government into disrepute—*is primarily intended to avoid affronts to the dignity of foreign governments and their diplomatic personnel.* The second feature—prohibiting "congregating"—is concerned more with threats to the security of the foreign government's representatives and property.

Maj. op. at 3-4 (emphasis added).

[14] Even this justification raises serious constitutional questions. *See supra* at 15 n.7.

curity of our foreign citizens abroad.[15] *See, e.g.*, Affidavit of James E. Nolan, Jr., Director of the Office of Foreign Missions, Department of State, J.A. at 47 ("what happens in terms of *security* provided to foreign diplomatic personnel and premises here has a direct impact on the protection afforded U.S. missions and personnel abroad") (emphasis added).

Thus, while the record before us supports to some degree the proposition that lessening the *security* of foreign embassies in this country might have adverse repercussions on our embassies abroad, there is not one word of evidence regarding what might happen if we allow marchers in front of the embassy to carry signs that hold the foreign government up to "public odium." Speculation could as easily run either way: that any reduction in the level of tranquility or good will around the embassy might lead to repercussions on our embassies abroad; or that given the government's contention that foreign governments closely scrutinize our policies regarding their embassies, and respond in an "eye for an eye" fashion, the only consequence that might ensue is that our own embassies would be subjected to "insult" signs by other countries' citizens.[16] The point is, of course, that mere speculation is not sufficient at least where there is no obvious relationship between the insult

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[15] The majority attempts to overcome this evidentiary gap by pointing out that the affidavits mention the Vienna Convention, which codifies this country's obligation to protect both the security and dignity of embassies. Maj. op. at 19. That treaty does not, however, provide evidence of a nexus between protecting embassies from *insult* and avoiding retaliation abroad any more than it provides evidence of a link between *security* interests and retaliation. "Expert judgment" is equally necessary in both cases.

[16] The major sponsor of the Senate Joint Resolution culminating in D.C. Code § 22-1115, did proffer at one point the explanation that the sign provision was designed to prevent the communication of ideas that threaten to

> bring the hatred of people upon us whose embassy is thus besmirched. . . . [A]ll the armies that can be furnished

> will not protect our men and women in China and Japan if we arouse and incur the hatred not of those governments but of their people by speaking unkindly or in a manner to bring into odium their Governments and their people.

81 Cong. Rec. 8589 (comments of Sen. Pittman, Aug. 10, 1937). Thus, it is evident that part of the statute's purpose, at least in its major sponsor's mind, was to protect the security of American citizens living abroad by diminishing the risk of incurring a foreign people's anger. *See also id.* at 8485 (comments of Senator Pittman, Aug. 7, 1937).

The opinion of a senator in 1937 that protecting foreign embassies from exposure to adverse signs was necessary to protect American nationals in foreign countries cannot, of course, be viewed as dispositive then, much less 50 years later. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake"). Unlike most duly-enacted laws which are presumed constitutional, the government bears the burden of proving the constitutionality of laws infringing on first amendment rights. *See generally* Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558, 1564 (1986).

The fact is, however, that even Senator Pittman rejected the hypothesis that an affront to the dignity of the embassy might have *official repercussions*. In response to a question as to whether the efforts of foreign governments to protect American nationals are dependent on the passage of the resolution, he responded that the foreign governments "no matter whether or not we protect them against insults and annoyance and possibly riot and physical injury, will do what they can to protect our citizens in their countries; but there is danger of physical injury when great and angry crowds meet in the way that has been referred to." 81 Cong. Rec. 8485 (remarks of Sen. Pittman, Aug. 7, 1937). It is thus apparent that the years have brought a shift in the governmental interest that is asserted to support the statute.

This shift in the interests that the statute serves is not, in and of itself, problematic. *See* Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 71 (1983) ("insufficiency of the

suffered from unsympathetic signs held in front of an embassy here and foreign governments' significant retaliation against our citizens abroad. If any disagreeable gesture to a foreign government is sure to turn into such retaliation, we are already endangering our nonresident citizens' lives by permitting embassy demonstrators at all, regardless of the presence or absence of signs. The silence of the record on this point belies any contention that there is a nexus between exposure to signs that disagree with a foreign government's policy and enhanced risk to Americans in that foreign country. Some affirmative evidence must surely be required to justify an explicitly content-based restriction on free speech.

The majority scrupulously fails to scrutinize the evidence actually submitted to the trial court to see whether it supports the D.C. government's claim that the sign provision is narrowly enough tailored to serve the compelling interests of national security. According to the majority, "[t]he four uncontradicted declarations submitted by defendants below indicate some of the special concerns justifying" D.C. Code § 22-1115. Maj. op. at 19. Far from "indicating" "some" of the concerns, the affidavits constituted the *entire* evidentiary record which the District Court had before it in deciding whether summary judgment was appropriate, and not one word in any of them documents or even predicts adverse effects if we were to allow insulting signs in front of embassies. Elementary rules of civil procedure dictate that summary judgment should not have been granted in the absence of any evidence indicating that the ban on signs was necessary to protect embassy security at home or abroad.

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original motivation does not diminish other interests that the restriction may now serve"). Such a change of interests served does, however, highlight the need for clear articulation and support for the current interests.

We cannot uphold the statute simply because the government has sent its lawyers into court to defend it. It is our job to demand facts and evidence to show that the asserted justification really exists. As the Supreme Court has explained, a reviewing court's duty in first amendment cases is "to *make its own inquiry* into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 843 (1978). Virtually all first amendment cases involve "delicate" issues, and many implicate foreign relations. *See, e.g., New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (per curiam) (rejecting government's attempt to restrain publication of Pentagon Papers on national security grounds). Yet, none of these landmark first amendment cases suggests the hands-off approach that the majority now uses to justify virtual abdication of judicial responsibility to closely scrutinize first amendment abridgements of pure political speech. *See supra* at 16 n.8.

B. *Underinclusiveness*

When the government makes a distinction based on the content of speech, it must demonstrate that this distinction is a close fit to its asserted interests. It is true that the Supreme Court

> frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it. *See, e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955). This presumption of statutory validity, however, has less force when a classification turns on the subject matter of expression. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S., at 95.

> Thus, "under the Equal Protection Clause, not to mention the First Amendment itself," *id.*, at 96, even a traffic regulation cannot discriminate unless there are clear reasons for the distinctions.

Erznoznik v. *City of Jacksonville*, 422 U.S. 205, 215 (1975).

The Court's treatment of content-based distinctions, which in many ways resembles its treatment of disfavored classifications such as race under the equal protection clause, is based on the proposition that such classifications are inherently suspicious and even dangerous, in and of themselves. Thus, content-based distinctions require a far stronger showing of narrow tailoring than more neutral classifications. Even a cursory analysis of the nature and effect of content distinctions reveals why.

First, "when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.'" *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 536 (1980) (quoting *Niemotko* v. *Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring)). Especially when the "purported concern [is] to avoid controversy excited by particular groups," distinctions "may conceal a bias against the viewpoint advanced by the excluded speakers." *Cornelius* v. *NAACP Legal Defense and Educational Fund, Inc.*, 105 S. Ct. 3439, 3455 (1985).

Moreover, content-based restrictions and, to an even greater extent, viewpoint-based restrictions distort the marketplace of ideas by allowing only one side of the debate to speak at the chosen forum. "[B]ecause by effectively excising a specific message from public debate, they mutilate 'the thinking process of the community' and are thus incompatible with the central precepts of the First Amendment," such statutes are not tolerated

save in the most exceptional circumstances. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189, 198 (1983) (quoting A. Meiklejohn, *Political Freedom* 27 (1960)).

Given these special concerns, underinclusiveness is not so readily acceptable in laws embodying content-based distinctions. The fact that the law fails to address the entire problem "undercut[s] the asserted importance of the government interest said to support the restriction." *Id.* at 206; *see Carey* v. *Brown*, 447 U.S. 455, 465 & n.9 (1980) ("overinclusiveness and underinclusiveness of the statute's restriction . . . undermine [state's] claim that the prohibition . . . can be justified by reference to the State's interest in maintaining domestic tranquility"). *See generally* Karst, *Equality As a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975).

Examination of D.C. Code § 22-1115 and its purported security justifications reveals that it is indeed severely underinclusive. The statute prohibits demonstrations with signs that disapprove of the embassy government's position, but allows demonstrations with signs that support it. Yet, the government's own affidavit lends support to the view that violence can as easily erupt from an "initially peaceful" demonstration as from an openly hostile one. Affidavit of Thomas D. Quinn, Special Agent in Charge in the Office of Protective Operations of the United States Secret Service, J.A. at 42. No affidavit suggests that demonstrations including signs of one viewpoint are more prone to outbreaks of violence with the police or other members of the public. Thus, there is no ground in this record for the majority's conclusion that demonstrations expressing support for an embassy's position "simply do not threaten" the interests of the foreign government in avoiding violence and maintaining its dignity. Maj. op. at 49. Imagine demonstrators carrying signs in front of the South African Embassy announcing, "We Support Apartheid." Surely they would

engender as much potential for violence and indignity as signs reading, "We Condemn Apartheid." Would a 1939 Nazi demonstration in front of the German Embassy with signs praising the Third Reich threaten the peace less than demonstrators decrying that regime? [17]

Moreover, even if documented, the argument that pro-embassy views are less dangerous than anti-embassy ones has no constitutional acceptability. It was soundly rejected in *Mosley*, where the city argued that "although it permits peaceful labor picketing, it may prohibit all nonlabor picketing because, as a class, nonlabor picketing is more prone to produce violence than labor picketing." 408 U.S. at 100. The Supreme Court disagreed, and instead laid down the rule that:

> Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression, and its intersection with the guarantee of equal protection would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis. "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines School District*, 393 U.S. at 508.

Mosley, 408 U.S. at 100-01. Similarly here, the mere prediction that anti-government demonstrations are likely to create more of a security threat than pro-government demonstrations is simply too broad a proposition to jus-

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[17] Although these examples are clear-cut, the kind of ideological line-drawing by government officials that may be necessary in some cases to decide which signs are supportive and which are critical of foreign governments is an additional constitutional problem in implementing the statute.

tify a classification on the basis of viewpoint like the one enshrined in § 22-1115.

C. *Neutrality As the Least Restrictive Alternative*

Finally, and most fundamentally, the statute could not pass constitutional scrutiny even if the fit between the content-based classification and the government's asserted compelling interest in security were neat or even if one accepted the majority's tenuous "dignity" justification. The Supreme Court's first amendment decisions instruct that the government has a duty, when it adopts a content-based restriction on speech, to show that it is the least restrictive means possible to accomplish a compelling interest. *See supra* at 5-7. That showing cannot be made here where a valid content-neutral time, place, or manner restriction is an available alternative to the viewpoint-based restriction.

The majority concludes that the content distinction is justified anyway because the alternative of prohibiting both viewpoints within 500 feet of the embassy will restrict even more speech. This conclusion wholly ignores the "equality principle" that the Supreme Court has recognized in first amendment jurisprudence. The court has on several occasions subordinated the first amendment interest in total aggregate speech to the first amendment interest in maintaining equality among speakers and, more importantly, viewpoints.

1. *The "Greater" Power Does Not Necessarily Include the Lesser*

There is more to the constitutional guarantee of free speech than quantitative measuring, *i.e.*, simply ensuring that the most people are allowed to say the most words possible. The Supreme Court has indicated that the Constitution tolerates, and may even require, some *broader* restrictions on speech in order to avoid the evil of nar-

rower content-based classifications. For example, in *Schacht* v. *United States*, 398 U.S. 58 (1970), the Court struck down a provision of a federal statute that authorized an actor to wear a military uniform while portraying a serviceman in a theatre or motion picture so long as "the portrayal does not tend to discredit that armed force." *Id.* at 59-60. Acknowledging that a *broad* prohibition on wearing "our military uniforms without authority is, standing alone, a valid statute," *id.* at 61, the Court nonetheless held that the *narrower* prohibition violated the first amendment, because it discriminated in favor of and against particular viewpoints.

Similarly, in *Police Department* v. *Mosley*, 408 U.S. 92 (1972), and in *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), the Court struck down statutes incorporating content distinctions even though broader, content-neutral restrictions on picketing would apparently have passed muster. Again, in *Carey* v. *Brown*, 447 U.S. 455 (1980), the Court struck down an Illinois statute that barred all picketing of residences except for "the peaceful picketing of a place of employment involved in a labor dispute." *Id.* at 457. The Court stressed that it should not be

> understood to imply, however, that residential picketing is beyond the reach of uniform and nondiscriminatory regulation. . . . " 'The crucial question, however, is whether [the Illinois statute] advances that objective in a manner consistent with the command of the Equal Protection Clause.' *Reed* v. *Reed*, 404 U.S. [71], 76 [(1971)]." *Police Department of Chicago* v. *Mosley*, 408 U.S., at 99. And because the statute discriminates among pickets based on the subject matter of their expression, the answer must be "No."

Id. at 470-71. *See also Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 215 n.13 (1975) (indicating that "narrowly drawn nondiscriminatory traffic regulation" would

be upheld even though *more* narrowly drawn discriminatory regulation was invalid).

This theme is consistent with the principle that the "constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression." *Pacific Gas & Electric Company* v. *Public Utilities Commission*, 106 S. Ct. 903, 907 (1986). As Justice Brennan has explained, "[t]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555. 587 (1980) (Brennan, J., concurring). It thus borders on the frivolous to suggest that the first amendment, or its "narrowly tailored" component, can be meaningfully applied by comparing the number of syllables that are uttered regardless of their content or the extent to which the government is providing an optimal forum to one side only of a political debate. In the words of a leading commentator, "the first amendment is concerned, not only with the extent to which a law reduces the total quantity of communication, but also—and perhaps even more fundamentally—with the extent to which the law distorts the public debate." Stone, *supra* p. 29, at 198. Once these core values are taken into account, it is not at all "odd to describe an alternative that restricts" more words, but preserves equality, as less restrictive of first amendment freedoms. *See* maj. op. at 30.

2. *Viewpoint Discrimination and the Available Alternatives*

The dangers of content discriminatory speech limitations are at their zenith when the discrimination is based not on the type of subject matter in general but on the particular viewpoint of the speaker. *See* Stephan, *The First Amendment and Content Discrimination*, 68 Va. L.

Rev. 203, 233 (1982). Contrary to the majority's suggestion,[18] the Supreme Court has

> *never held* that government may allow discussion of a subject and then discriminate among viewpoints on that particular topic, even if the government may entirely exclude discussion of the subject from the forum. In this context, the greater power does not include the lesser because for First Amendment purposes exercise of the lesser power is more threatening to core values. Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of "free speech."

Perry Education Association v. *Perry Local Educators' Association*, 460 U.S. 37, 61-62 (1983) (Brennan, J., dissenting) (emphasis added). Indeed, in *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976), the plurality, while suggesting the legitimacy of some content-based distinctions, was careful to point out that *viewpoint* discrimination was not involved in the case. *Id.* at 67-68.

The driving concept of the first amendment to promote a marketplace of ideas is twisted out of shape when, through governmental action, only one side of the debate is permitted access to the premium selling booth. While the Constitution does not guarantee speakers the best

[18] The majority suggests that, in one case, the Supreme Court has tolerated viewpoint-based regulation of speech. *See* maj. op. at 37 (citing Parker v. Levy, 417 U.S. 733 (1974)). Nothing in *Parker* supports this proposition. First, although the statute was arguably viewpoint-based, Parker did not challenge that aspect of it before the Court. Moreover, even if we attribute relevance to the Court's silence on that issue, we cannot ignore the Court's repeated admonitions that its ruling in *Parker* was unique to the military context. The Court stressed that " '[i]n the armed forces some restrictions exist for reasons that have no counterpart in the civilian community. . . . Speech that is protected in the civilian population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.' " *Id.* at 758-59 (quoting United States v. Priest, 45 C.F.R. 338, 344 (1972)).

possible media exposure, *see Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981), it does guarantee competitors *equal access* to such exposure. Above all else, the first amendment "forbids government to interfere with the competition of ideas." *Georges* v. *Carney*, 691 F.2d 297, 300 (7th Cir. 1982). The viewpoint distinction in D.C. Code § 22-1115 violates this core principle with a vengeance.

D.C. Code § 22-1115 is obviously a viewpoint-based regulation. A picketer's access to the 500 foot zone turns exclusively on whether his signs applaud or condemn the government of the embassy. Yet the majority suggests that because the statute applies equally to those who wish to protest against the East German and the West German embassies, it does not illegitimately discriminate among viewpoints. Maj. op. at 50. The majority's argument is silly. Issues and controversies do not divide themselves neatly along national lines like paired legislative votes. The statute does engage in viewpoint discrimination when anyone who wishes to disagree with any country's policy is banned from picketing at that country's embassy, while those supporting it are welcomed. Indeed, the legislative history reveals no small amount of intolerance for groups who choose to demonstrate against other countries' policies.[19]

[19] Discussing the protests that he received about the statute, Senator Pittman stated:

> Whence come these protests against the joint resolution? Have we heard the American Legion appealing to us . . .? Have we heard the Veterans of Foreign Wars appealing to us . . .? Have we heard the Daughters of the American Revolution protesting that by the enactment of this resolution we are destroying constitutional rights?
>
> * * * *
>
> No! Telegrams are coming to us, but who are they from? Some day before our committee we will find out who is sending them. . . .

81 Cong. Rec. 8590 (remarks of Sen. Pittman, August 10, 1937).

It is still not clear whether the heightened special fears associated with viewpoint-based regulation mean that our Constitution will *never* tolerate regulation based on the speaker's viewpoint.[20] In *Carey* v. *Brown*, 447

[20] Schacht v. Brown is one of the only modern Supreme Court decisions dealing with a viewpoint-discriminatory statute. After wearing an army uniform in a street skit protesting American involvement in the Vietnam war, Schacht had been convicted of violating 18 U.S.C. § 702, which forbids unauthorized wearing of the uniform of the armed forces of the United States. Schacht defended himself on the basis of 10 U.S.C. § 772(f), which provided that "[w]hile portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force *if the portrayal does not tend to discredit that armed force.*" (emphasis added). After explaining that a blanket prohibition on unauthorized wearing of a uniform would be valid, 398 U.S. at 61, the Court nonetheless struck down the conviction, holding that:

> In the present case Schacht was free to participate in any skit at the demonstration that praised the Army, but . . . he could be convicted of a federal offense if his portrayal attacked the Army instead of praising it. . . . Clearly punishment for this reason would be an unconstitutional abridgment of freedom of speech. The final clause of § 772(f), which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment. To preserve the constitutionality of § 772(f) that final clause must be stricken from the section.

Id. at 63. Significantly, the Court never looked to any potential justifications or compelling interests that might lie behind the distinction. On the other hand, language in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), might be read to support the theory that some viewpoint discriminatory statutes could pass muster, at least in the school setting. *See id.* at 511 ("the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible"). *But see* Bethel School District No. 403 v. Fraser, 54 U.S.L.W. 5054 (July 7, 1986) (different first amendment standards apply in the school setting).

U.S. 455, 465 (1980), however, the Court did explain that it "might agree that certain state interests may be so compelling *that where no adequate alternatives exist* a content-based distinction—if narrowly drawn—would be a permissible way of furthering those objectives" (emphasis added). We need not resolve the ultimate issue in this case.[21] It is enough that an obvious and constitutionally acceptable alternative is available here, *i.e.*, a viewpoint-neutral restriction on *all* demonstrating in the vicinity of an embassy. The existence of this obvious alternative serves to further condemn the viewpoint discriminatory § 22-1115.

I can think of few scenarios more antithetical to first amendment values than one involving two groups—one pro-foreign government, one anti-government—simultaneously approaching an embassy with signs. The policemen's task under § 22-1115 is to discern the viewpoint of each speaker and allow one group to pass the 500 foot barrier while forcing the other group to stay behind it. Those barred from the forum are not only deprived of access, but are also forced to watch their competitors take over the forum for their exclusive use. How much less odious to first amendment freedoms and values if *all* embassy demonstrators were forced to respect the 500 foot limit?[22]

[21] Because of the existence of an alternative to viewpoint discrimination in this case, I need not decide this issue. What the majority terms as ambivalence, maj. op. at 38 n. 14, I prefer to think of as adherence to the long-standing principle of deciding constitutional issues as narrowly as the case allows.

[22] The majority argues that my approach is inconsistent with the Supreme Court's decision in Cox v. Louisiana, 379 U.E. 559 (1965), and this court's unpublished order in Jackalone v. Andrus, No. 79-2359 (D.C. Cir. Nov. 19, 1979). Maj. op. at 31. The majority misconstrues the import of those decisions, and exaggerates the scope of my approach. *Cox* was decided in 1965, well before the Supreme Court

Thus, I do not believe that D.C. Code § 22-1115 is the least restrictive method of dealing with the interests that the government has proffered, even if these interests are

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developed its special rules for dealing with content-based restrictions. In any event, the statute there, while arguably content-based, was clearly not viewpoint-based and thus did not implicate the same concerns as the one here.

As for *Jackalone*, I find it troublesome that the majority ignores the Circuit Rule which, as the majority concedes, provides that unpublished orders are not citable as precedents. Maj. op. at 31. *See also* Western Union Telegraph Co. v. FCC, 773 F.2d 375, 377 n.1 (D.C. Cir. 1985) (admonishing counsel not to cite unpublished orders) (per Scalia, J., with Mikva, J., and Bork, J., concurring). While the majority seems to assume that a case is not cited "as precedent" unless it controls the decision, traditionally a case is used as precedent whenever it is "considered as furnishing *an example* or authority for an identical or similar case afterwards arising." *Black's Law Dictionary* 1059 (5th ed. 1979) (emphasis added). The majority clearly relies on *Jackalone* for its quality as precedent, and Rule 8(f) itself indicates that unpublished cases are only to be cited for purposes such as *res judicata* "which turn on the binding effect of the judgment, and not on its quality as precedent." Under the dictionary definition of precedent and the history of circuit practice under Rule 8(f) there is no support whatsoever for the majority's use of *Jackalone* in its decision.

In any case, the fact that the order in *Jackalone* was all of three sentences and set out no background facts renders it useless even as an instructive guide. If, as the briefs tend to indicate, *Jackalone* merely held that the government rightfully denied a permit since, in view of the hostage crisis, there was "a clear and present danger to the public safety, good order, or health," *see* 36 C.F.R. § 50.19(d)(2), there is no inconsistency. Such a regulation would be clearly content-neutral. Although the majority asserts that the regulation in *Jackalone* was actually applied based on the content and viewpoint of the speech, maj. op. at 32 n.12, the government's brief in *Jackalone* denies this. Brief for Federal Appellants at 11. If the Park Service had promulgated a permanent regulation banning all anti-Iranian demonstrations in the park, I certainly would argue that a viewpoint-neutral regulation should have been substituted. We, of course, have no idea from the order if the court in *Jackalone* even considered the "content"

legitimate and compelling ones. A viewpoint-neutral regulation prohibiting *all* embassy-related sign holding in the 500 foot zone around the embassy would provide greater protection from the dangers to both dignity and security than the current regulation does,[23] would remove

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issue, which makes it even more farfetched to suggest that *Jackalone* represents the judgment of a panel of this court on any issue before us.

The majority's failure to recognize the differing impacts of content-based and viewpoint-based regulation is again evidenced by its own hypothetical which asks whether "a locality that wished to prohibit the shouting of 'Fire!' in a crowded theatre" should not "be constitutionally required to outlaw the shouting of 'Encore' as well." Maj. op. at 51. The majority misses the point that the fire/encore distinction is a content-based one, while § 22-1115 is viewpoint-based. Building on the analogy, § 22-1115 is equivalent to telling the audience they may yell encore, but may not boo at the end of a performance that they dislike.

[23] Such a ban might be upheld solely on the basis of the important governmental interest in protecting embassy security. *Cf.* CISPES v. FBI, 770 F.2d at 468, 472-75 (5th Cir. 1985); Concerned Jewish Youth v. McGuire, 621 F.2d 471 (2d Cir. 1980), *cert. denied*, 450 U.S. 913 (1981). The fit between a total ban and the security interest would be tighter than that between § 22-1115 and the security interest, which is not narrowly served by a content- and viewpoint-based restriction. Such a statute would still provide more protection than the general embassy statute, 18 U.S.C. § 112, discussed *supra* at 17. This extra protection might, depending on the factual showings made, be reasonable in light of the peculiar security concerns in the District of Columbia, such as those the government discussed in its affidavits.

It is also possible that a content-neutral ban could be upheld, at least in part, based on the government's asserted "dignity" interest. Although I have concluded that dignity does not rise to the level of a compelling interest so as to justify the content-based restrictions of § 22-1115, it might qualify as a "significant" enough interest to justify a content-neutral ban. Contrary to the majority's suggestion, maj. op. at 32-33, there is no inconsistency in this position unless one sees fit to ignore two decades of Supreme Court precedent establishing dramatically different levels of scrutiny for

the problem of viewpoint discrimination, and would provide an equally accessible forum for all speakers outside of the 500 foot zone.[24]

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content-based and content-neutral regulation of speech. *See supra* at 5.

[24] This is not to say that this balance would be the same in each and every case involving content-based distinctions. For example, where the goal of neutrality would require broad, outright prohibitions on otherwise protected speech, that might not be considered an acceptable alternative. *See* Redish, *The Content Distinction in First Amendment Analysis*, 34 Stan. L. Rev. 113, 136-37 (1981); Comment, *Equal But Inadequate Protection: A Look at* Mosley *and* Grayned, 8 Harv. C.R.-C.L. L. Rev. 469, 476 (1973). Similarly, even if one assumes that the Court treated the statute in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), as a traditional content-based distinction, *but see supra* note 5, any content-neutral statute there would have required forcing all theatres to move to the outskirts of the city. This is far different from establishing a 500 foot neutral zone. Moreover, since the objective in *Young* was to segregate the adult theatres, requiring all theatres to be in a single area would hardly have accomplished the goal. Finally, as the court in *Young* stressed, that statute did not involve viewpoint discrimination. *See Young*, 427 U.S. at 67-68.

In this case, by contrast, a blanket bar against protests in the 500 foot zone would leave opportunities for expression elsewhere, as required of a content-neutral time, place, and manner regulation. *See* Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 654 (1981) (discussing requirement of adequate alternative forum). As the majority repeatedly points out, closing off a 500-foot zone around embassies is a limited impingement on speech, if applied across-the-board. The majority's analysis is, of course, totally inapposite to the statute at hand, which involves a content-based restriction. The availability of a forum 500 feet away is only relevant when a content-neutral statute is involved, since the Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression." *Consolidated Edison Company*, 447 U.S. at 541 n.10.

Everyone agrees that embassies deserve to be protected against genuine dangers to their security, even if that means total prohibitions against demonstrations within close range. What we do not agree on is whether dignity interests can rise to a level compelling enough to justify protecting embassies by using a ban on free speech that discriminates in an arbitrary and unnecessary way between those who may demonstrate in front of embassies and those who may not. Certainly a fair and rational law which embodies no such discrimination could not be perceived in any foreign quarter as a lesser protection for foreign representatives, warranting retaliatory action against Americans living in their country.

IV. Standardless Discretion

The second clause of § 22-1115 makes it unlawful "to congregate within 500 feet of any such building or premises, and refuse to disperse after having been ordered so to do by the police authorities of the said District." D.C. Code § 22-1115. In short, congregation (provided that there are no signs) anywhere within 500 feet of the embassy—up to the very gates—is permissible, *unless the police decide* it is not, and order the crowd to disperse.

Undoubtedly the District may grant authority to its police to disperse crowds and preserve the public peace under certain circumstances. *See Cox* v. *Louisiana*, 379 U.S. 536 (1965). But in describing that authority, the Supreme Court has been careful to point out that it must be "appropriate, limited discretion, under properly drawn statutes or ordinances." *Id.* at 558. For example, in the area of licensing, the Court has declared that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 150-51 (1969). Similarly, the Supreme Court has insisted that the "legislature establish

minimal guidelines to govern law enforcement" officials in the exercise of their discretion. *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974)). Standards are, ironically, deemed essential in other cases to avoid the very possibility, ensconced in the statute here, of public officials' taking the speaker's content and viewpoint into account in determining whether to license, or in this case, disperse, a gathering. *See generally Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947, 964 n.12 (1984); *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 628-32 (1980); *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 620 (1976); *Staub* v. *City of Baxley*, 355 U.S. 313, 321-25 (1958); *Lowell* v. *City of Griffin*, 303 U.S. 444, 451-53 (1938).

But § 22-1115 provides no guidance at all as to when the police should and should not disperse a "congregating" group. In *Zaimi* v. *United States*, 476 F.2d 511, 515 (D.C. Cir. 1973), this court explained that the second section of the statute, *i.e.*, the congregating provision, is "functionally" separate from the first part, dealing with signs. This court clearly held that the portion of the ordinance prohibiting congregating was not qualified by the first portion of the ordinance. *Id.* at 527. Thus the majority cannot, consistent with circuit precedent, save this portion of the ordinance from facial invalidity by interpreting the ordinance to allow the police to order dispersal only when they "reasonably believe that a threat to the security or peace of the embassy is present." Maj. op. at 43.[25] While the majority by judicial fiat reads

[25] In Frend v. United States, 100 F.2d 691 (D.C. Cir. 1938), *cert. denied*, 306 U.S. 640 (1939), the court interpreted the permit provision of the statute's first clause in a manner that avoids this difficulty. The clause makes it unlawful to display the listed items within 500 feet of the listed buildings "except by, and in accordance with, a permit issued by the Chief of Police of the said District." Nonetheless, the court amazingly concluded that the statute

> [b]y its terms . . . makes it a misdemeanor to do the prohibited things, and the provision authorizing the Superintendent of Police to issue a permit must be read as authorizing its issuance subject to the prohibitions of the resolution. That is to say, that only in those cases in which its use will not harass or bring into public odium the representatives of foreign governments, does power to issue exist.

Id. at 694. This reading of the statute, is, of course, nonsensical. Only those who wish to engage in what is enumerated in the statute need to seek permits, yet, according to *Frend* permits may not be issued to anyone who intends to do that which is enumerated. Nonetheless, that portion of *Frend* does represent the law of the circuit until overruled by the full circuit or by the Supreme Court. Undoubtedly taking this into account, plaintiffs have not challenged the licensing scheme of the statute's first clause.

into the second part of the ordinance an overriding purpose of protecting the dignity of the embassy, maj. op. at 43 & n.17, that purpose is nowhere to be found in the language of that part of the ordinance. In addition, only a narrowing interpretation by a state court or legislature can be relied upon to qualify a potentially standardless restriction on speech so as to overcome a constitutional challenge. *Gooding* v. *Wilson*, 405 U.S. 518, 520 (1972); *Hill* v. *City of Houston, Texas*, 764 F.2d 1156, 1164-65 (5th Cir. 1985).

This statute is thus very different from the majority's example, D.C. Code § 22-1121(2), which this court upheld in *Washington Mobilization Committee* v. *Cullinane*, 566 F.2d 107 (D.C. Cir. 1977). *See* maj. op. at 41-42. On its face, § 22-1121(2) penalizes one who "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby—(2) congregates with others on a public street and refuses to move on when ordered by the police." The ordinance had, however, been interpreted by this court earlier, act-

ing as a local court (before the present D.C. local court system was created), to apply only to conduct which constitutes a nuisance or creates a substantial risk of provoking violence. *Id.* at 116. Relying on this narrowing construction of the phrase "breach of the peace," we found that the ordinance was constitutional. *Id.* at 116-17.[26] But, as I have explained, *Mobilization Committee*'s limiting technique is not available with respect to § 22-1115. *See supra* at 42-43.

Our disposition of this issue is controlled by this court's decision in *United States* v. *Abney*, 534 F.2d 984 (D.C. Cir. 1976) (per curiam), where we struck down the conviction of a protestor who, while protesting in Lafayette Park, violated a regulation which provided that "[s]leeping, loitering or camping with intent to remain for a period of more than four hours in any park area, is prohibited, *except upon proper authorization of the Superintendent.*" *Id.* at 985 (emphasis added). The court held that

> [t]he regulation gives the Superintendent authority to grant permission to sleep in the park beyond the time limit specified, but it contains no "narrow, objective, and definite standards to guide the licensing authority" [citing *Shuttlesworth*] to guard against the danger of arbitrary action or *de facto* censorship of certain points of view. If the *Shuttlesworth* standard of "public welfare, peace, safety, health, decency, good order, morals, or convenience" is facially unconstitutional, the totally unfettered discretion granted to the Superintendent here cannot survive constitutional challenge.

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[26] The D.C. police line regulation, also cited by the majority and upheld by this court, specified five emergency situations in which police could set up an exclusionary zone and order people away. Because the regulation specified which specific situations triggered its use, and did so without "rely[ing] on subjective terms to define proscribed conduct," 566 F.2d at 117-18, it was also found to be constitutional.

Id. at 985-86. These principles apply equally to the totally unfettered discretion given to the police in § 22-1115. *See Cox* v. *Louisiana*, 379 U.S. 559, 573 (1965); *Association of Community Organizations for Reform Now* v. *Municipality of Golden, Colorado*, 744 F.2d 739, 747 (10th Cir. 1984).

Some sense of the amazing breadth of discretion accorded police to disperse congregations by § 22-1115 can be gleaned by comparing it to other statutes recently declared invalid by the courts. In *Beckerman* v. *City of Tupelo, Mississippi*, 664 F.2d 502 (5th Cir. 1981), for example, the court invalidated a parade ordinance which authorized the chief of police to deny a permit upon finding that "the conduct of the parade will probably cause injury to persons or property or provoke disorderly conduct or create a disturbance." *Id.* at 507. The court held that the term "provoke disorderly conduct" was susceptible of a broad interpretation, which would allow the chief of police "to deny permits to those seeking to engage in protected activity," *id.* at 508, and explained that:

> No narrowing construction has been offered by the Tupelo City Council or the Mississippi courts. Because we do not sit as a "super" state legislature, we may not impose our own narrowing construction onto the ordinance. . . . We fully recognize the fact that Tupelo enacted the ordinance in good faith and intends to apply it in a fair manner. We cannot, however, overlook the substantial potential for overbroad application of the ordinance.

Id. at 509. *See also Association of Community Organizations for Reform Now* v. *Municipality of Golden, Colorado*, 744 F.2d 739 (10th Cir. 1984); *Cinevision Corp.* v. *City of Burbank*, 745 F.2d 560, 571 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2115 (1985).

The majority tries to avoid the confrontation with these recent precedents[27], first by feebly attempting to

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[27] The local District of Columbia courts have recognized the applicability of this doctrine in dealing with similar D.C.

distinguish *Shuttlesworth* and *Abney*. *See* Maj. op. at 40-41. Even if these were the only cases on point, the distinction that the majority draws between permits in general and "sensitive areas," maj. op. at 41, would be illogical. There is nothing about "sensitive areas" that makes it impossible to carefully draft a statute delineating the standards by which the police are to exercise their authority to disperse congregating groups.

The majority also suggests that "a court would [not] sustain a conviction *under this statute* for refusal to disperse upon a policeman's order if the policeman had acted out of personal malice [or] to prevent the sidewalk sale of neckties." Maj. op. at 43. That answer, however, ignores the longstanding first amendment doctrine that "[p]roof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemina-

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statutes in "sensitive" areas. In United States v. Nicholson, Nos. 20210-69A, et al. (D.C. Ct. of Gen. Sess. June 19, 1969), *aff'd*, 263 A.2d 56 (D.C. 1970), Chief Judge, now District Court judge, Harold H. Greene held that policemen in the United States Capitol could not constitutionally use a standardless unlawful entry on property statute to order the defendants to leave the Capitol. *See* Dellums v. Powell, 566 F.2d 167, 178-79 (D.C. Cir. 1977) (discussing *Nicholson*). The *Nicholson* court then turned to D.C. Code § 9-113 which forbids anyone to "parade, stand, or move in processions or assemblages in said United States Capitol Grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement" except with the permission of the Speaker of the House and the President of the Senate, or in their absence from Washington, the Capitol Police Board. *See* D.C. Code §§ 9-124, 9-125. The court held that this vesting of standardless discretion violated the principle that "in a government of laws, the regulation of conduct—particularly conduct in the sensitive area covered by the First Amendment—must be predicated on a set of definite rules, *not on the opinions of police officers*." *See Dellums*, 566 F.2d at 200 (reproduction of *Nicholson* decision) (emphasis added).

tion of ideas." *Thornhill* v. *Alabama*, 310 U.S. 88, 97 (1940); *see also Hynes* v. *Mayor of Oradell*, 425 U.S. 610 (1976); *Staub* v. *City of Baxley*, 355 U.S. 313 (1958); *Lovell* v. *Griffin*, 303 U.S. 444 (1938).

But the fact is that this is not even a case where a speaker is attempting to challenge a licensing scheme without having asked for and been denied a license. The plaintiffs here alleged that on multiple occasions the police used this standardless statute to prevent them, on penalty of arrest, from peacefully congregating. That is clearly enough for a facial attack on the statute, and I simply do not understand how the court can principledly avoid it. The dispersion portion of the law is patently void for lack of any governing criteria.

V. Conclusion

The majority opinion, by blindly deferring to the political branches and unquestioningly accepting their assertion of an ill-defined interest in protecting foreign emissaries from annoyance and insult, effectively gouges out an enormously important category of political speech from first amendment protection. The fact that *some* regulation of speech is needed to serve a compelling interest in preserving security, and the fact that *some* deference is due to coordinate branches, does not, however, mean that the court has no role in assuring that the regulatory scheme is fine-tuned in accordance with constitutional principles. If the court were to accept its mandate and invalidate this statute, Congress could easily draft an alternative that would be just as protective of security, but far less abhorrent to the first amendment.

The majority attempts to ignore well-settled constitutional principles by emphasizing what it perceives to be the trivial nature of the restrictions at issue here. *See, e.g.*, maj. op. at 51-53. But what may seem trivial to the majority is obviously not so trivial to those who brought

this suit, nor to those anti-apartheid protestors whose arrests in front of the South African embassy we followed on the front pages and on the evening news for over a year; they have risked and suffered arrest in order to gain access to what they perceive to be the most effective forum in which to express their convictions.[28] There is, so far, no constitutional principle setting out hybrid rules of scrutiny for "trivial" viewpoint regulation of free speech.

Given the passage of a half century since § 22-1115 was enacted, and the dramatic developments in our first amendment jurisprudence during these five decades, I hope that Congress will revisit this statute and show it has the constitutional sense to do what this court will not.

I respectfully dissent.

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[28] Under the majority's "trivial question doctrine" many of the Supreme Court's important first amendment decisions might never have been delivered since there were undoubtedly alternative forums for communication and the thinking processes of the community were not noticeably mutilated. *See, e.g.*, United States v. Grace, 461 U.S. 171 (1983) (invalidating restrictions within vicinity of Supreme Court building); Police Department v. Mosley, 408 U.S. 92 (1972) (invalidating content-based restriction within 150 feet of school).

United States Court Of Appeals

For the District of Columbia Circuit

No. 84-5327 September Term, 1986

R. David Finzer,
Father, et al., C.A. 84-00899

Appellants

v.

Marion S. Barry, Mayor,
District of Columbia, et al.

Appeal from the United States District Court for the District of Columbia.

BEFORE: WALD, Chief Judge, BORK, Circuit Judge, and DAVIS*, Circuit Judge, United States Court of Appeals for the Federal Circuit

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

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* Sitting by designation pursuant to 28 U.S.C. §291(a).

On consideration thereof It is ordered and adjudged by this Court that the judgment-------of the District Court appealed from in this cause is hereby affirmed as to the constitutionality of section 22-1115 and this case is remanded with instructions, all in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For the Court:

/s/
George A. Fisher
Clerk

Date: August 19, 1986
Opinion for the Court filed by Circuit Judge Bork.
Dissenting opinion filed by Chief Judge Wald.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FATHER R. DAVID FINZER, ET AL., Plaintiffs,	)	Civil Action
v.	)	
MARION S. BARRY, JR., Mayor, ET AL., Defendants.	)	No. 84-0899

MEMORANDUM-ORDER

This case involves a constitutional challenge to D.C. Code § 22-1115 ("Section 22-1115"), which was enacted by Congress in 1937. It provides:

> It shall be unlawful to display any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public oduim any foreign government, party, or organization, or any officer or officers thereof, or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government, party, or organization, or to intimidate, coerce, harass, or bring into public disrepute any officer or officers or diplomatic or consular representatives of any foreign government, or to interfere with the free and safe pursuit of the duties of any diplomatic or consular

> representatives of any foreign government, within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, or for other official purposes, except by, and in accordance with, a permit issued by the Chief of Police of the said District; or to congregate within 500 feet of any such building or premises, and refuse to disperse after having been ordered so to do by the police authorities of the said District.

Section 22-1115 has been upheld against a first amendment challenge in Frend v. United States, 100 F.2d 691 (D.C. Cir. 1938), cert. denied, 306 U.S. 640 (1939), and against an equal protection challenge by a three-judge court in Jewish Defense League, Inc. v. Washington, 347 F. Supp. 1300 (D.D.C. 1972). As the Court wrote in the latter case, the "thorough and analytical opinion" in Frend v. United States "remains the law in this jurisdiction." 347 F. Supp. at 1300.

See also Jews for Urban Justice v. Wilson, 311 F. Supp. 1158 (D.D.C. 1970); United States v. Brown and United States v. Faron, No. M-10901-83 (D.C. Sup. Ct. Jan. 20, 1984).

Plaintiffs wish to demonstrate within 500 feet of the Russian and Nicaraguan Embassies carrying signs critical of the Russian and Nicaraguan governments. In particular, they wish to demonstrate tomorrow in front of the Russian Embassy carrying signs with the messages "Release Sakharof" and "Freedom for Sakharof's Wife". Because such conduct may be prohibited by Section 22-1115, they contend the statute is unconstitutional. The only contention they raise, however, that was not considered in Frend or Jewish Defense League is that Section 22-1115 automatically violates the Equal

Protection Clause because it is not content-neutral. This argument is without merit.

In Carey v. Brown, 447 U.S. 455, 461-62 (1980), the Supreme Court held:

> When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized.

See also Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 536 (1980); Police Department of Chicago v. Mosley, 408 U.S. 92, 98-99 (1972). Section 22-1115 satisfies this standard.

Section 22-1115 serves a compelling governmental interest. As the affidavits and declarations submitted by the District of Columbia and the United States, as amicus curiae, demonstrate, this statute is necessary for the

protection of the personnel and property of foreign governments located in Washingtonn, D.C. Demonstrations in opposition to the policies of a foreign government are obviously more likely to result in violence against foreign personnel or property than demonstrations in support of a foreign government. The United States is obligated under international law to insure the safety of diplomatic and consular representatives of foreign governments in this country. Moreover, fulfilling this obligation improves the chances that foreign governments will extend to the diplomatic corps of the United States reciprocal treatment. In this age of increasing terrorism, Section 22-1115 is more important than ever. Section 22-1115 helps the Secret Service, District of Columbia police, and other law

enforcement organizations prevent incidents of violence at foreign embassies that could dangerously increase international tensions. Few government interests are more compelling.

Accordingly, plaintiffs' motions for a preliminary injunction, for an immediate preliminary injunction (which the Court is treating as a motion for a temporary restraining order), and for summary judgment are denied and defendants' motion for summary judgment is granted.

/s/

Judge Oliver Gasch

Date: May 17th 1984

OPPOSITION

BRIEF

No. 86-803

Supreme Court, U.S.
FILED
JAN 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL BOOS, J. MICHAEL WALLER AND
BRIDGET BROOKER
Petitioners,

v.

MARION S. BARRY, JR., MAURICE T. TURNER,
THE DISTRICT OF COLUMBIA AND FATHER R. DAVID FINZER,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Does a congressional statute, designed to carry out the United States' obligations under international law to protect foreign diplomatic missions, violate the right of free speech because it prohibits hostile demonstrations within 500 feet of foreign missions located in the District of Columbia?

TABLE OF CONTENTS

	Page
Question Presented	i
Statement	1
Reasons for Denying the Writ	6
I. *The consistency between the decision of the court of appeals and prior decisions going back fifty years, and the purely local applicability of the statute counsel denial of writ*	6
II. *Compelling national interests in the conduct of foreign policy and in meeting obligations under international law permit Congress to impose the limited restrictions of D.C. Code §§* 22-1115 and 22-1116	7
III. *The labor exemption on picketing does not warrant relief to petitioners*	10
IV. *Petitioner's other arguments do not warrant grant of the writ*	11
Conclusion	12

TABLE OF AUTHORITIES

CASES:

Carey v. *Brown*, 447 U.S. 445 (1980)	9, 10
CISPES v. *F.B.I.*, 770 F.2d 468 (5th Cir. 1985)	7
Concerned Jewish Youth v. *McGuire*, 621 F.2d 471 (2d Cir. 1980), *cert. denied*, 450 U.S. 913 (1981)	7
Frend v. *United States*, 69 App. D.C. 281, 100 F.2d 691 (1938), *cert. denied*, 306 U.S. 640 (1939)	2, 7
Jewish Defense League v. *Washington*, 347 F. Supp. 1300 (D.D.C. 1972) (three-judge court)	7, 10
Jews for Urban Justice v. *Wilson*, 311 F. Supp. 1158 (D.D.C. 1970)	7

TABLE OF AUTHORITIES—Continued

	Page
CASES:	
Perry Education Assn. v. *Perry Local Educators' Assn.*, 460 U.S. 37 (1983)	9
Police Department of Chicago v. *Mosley*, 408 U.S. 92 (1972)	10
United States v. *Grace*, 461 U.S. 171 (1983)	9
Widmar v. *Vincent*, 454 U.S. 263 (1981)	9
Zaimi v. *United States*, 155 U.S. App. D.C. 66, 476 F.2d 511 (1973)	7
STATUTES:	
Constitution Article I, § 8 Cl.10	2
D.C. Code §§ 22-1115, 1116 (1981), Act of Feb. 15, 1938, 52 Stat. 30, ch. 29, §§ 1, 2, as amended	passim
18 U.S.C. 112	7
OTHER AUTHORITIES:	
81 CON. Rec. 7962, 8484-85, 8587, 8593 (1937)	2
Vienna Convention on Diplomatic Relations, Art. 22, 23 U.S.T. 3227, 3236, TIAS No. 7502	2, 3, 5, 8

In The

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No. 86-803

MICHAEL BOOS, J. MICHAEL WALLER AND
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Petitioners,

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MARION S. BARRY, JR., MAURICE T. TURNER,
THE DISTRICT OF COLUMBIA AND FATHER R. DAVID FINZER,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATEMENT

This case involves the facial validity of D.C. Code §§ 22-1115 and 22-1116 (1981), which are challenged on first amendment grounds. Petitioners seek review of the D.C. Circuit decision (per Bork, J.), that upheld the validity of these local code provisions over a dissenting vote (Wald, C.J.).

These provisions make political demonstrations against a foreign government unlawful in the District of Columbia, when demonstrations are conducted within 500 feet of the foreign government's embassy or other property. Section 22-1115 makes it unlawful to "display any flag, banner, placard or device * * * designed * * * to * * * bring into public

odium any foreign government * * * or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government" within 500 feet of that country's embassy. The statute also makes it unlawful "to congregate [for the foregoing purposes] within 500 feet of any [embassy], and refuse to disperse after having been ordered to do so by the police authorities."

Petitioners want to engage in demonstrations prohibited by these provisions in front of the Soviet and Nicaraguan embassies. They want to carry signs which say "STOP THE KILLING" in front of the Nicaraguan embassy and "RELEASE SAKHAROV" or "SOLIDARITY" in front of the Soviet Union's embassy and to congregate with others in their demonstrations.

Congress enacted § 22-1115 nearly fifty years ago pursuant to its power under Article I, § 8, Cl.10 of the Constitution, "To define and punish * * * Offences against the Law of Nations." (A.8a)[1] The purposes of the statute are to implement the obligations of the United States under international law requiring protection of the safety and the peace and dignity of foreign diplomatic missions and diplomats in the District of Columbia and to secure reciprocal protections abroad for United States' diplomatic missions and personnel. See, 81 CONG. REC. 7962, 8484-85, 8587, 8593 (1937).[2] Custom and the Vienna Convention on Diplomatic Relations impose the duty on a host state to "prevent any disturbance of the peace of the [foreign] mission or impairment of its dignity." *Supra*, n.2

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[1] See also, *Frend* v. *United States*, 69 App. D.C. 281, 100 F.2d 691 (1938), *cert. denied*, 306 U.S. 640 (1939).

[2] The court of appeals described the nature and sources of these intentional obligations at length. (A.8a-16a). The duties of a host state under international law in regard to foreign missions rest in part on custom and common understandings; they are also set out in Article 22 of the 1961

(footnote continued)

The undisputed affidavits of four officials offered in support of respondents' motion for summary judgment establish that the statute serves these important functions today at least as much as when it was enacted nearly fifty years ago. However, as the court of appeals noted, it takes no special expertise to recognize that the display of a sign in front of an embassy characterizing members of a foreign government as "killers" constitutes an affront to the dignity of that government. (A.19a-20a).

State Department officials James E. Nolan Jr., in charge of foreign missions, and David Fields, who coordinates security arrangements for foreign diplomatic personnel in the District of Columbia, stated that enforcement of § 22-1115 is essential to the foreign policy interests of the United States. There is a direct relationship between the protections afforded foreign diplomats here and protections provided our diplomatic personnel and missions abroad. These foreign policy experts, together with two law enforcement experts, also believed that the 500-foot buffer zone created by the statute provides critical assistance to the security of diplomats and diplomatic buildings in Washington due to the potential for demonstrations to erupt into violence.

(footnote continued from previous page)

Vienna Convention on Diplomatic Relations, which provides:

> 1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
>
> 2. *The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.*
>
> 3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

23 U.S.T. 3227, 3236, TIAS No. 7502 (emphasis added).

Secret Service Special Agent Thomas D. Quinn and Deputy Chief John C. Connor of the Metropolitan Police Department, both in charge of providing security to foreign missions in the District of Columbia, attested to the special problems of providing security, because their personnel may not enter the premises of foreign diplomatic buildings unless expressly invited. This contrasts sharply with security arrangements at domestically-controlled buildings such as the White House. At the White House, for example, security personnel are constantly present and have a security network consisting of a central command center, manned perimeter posts, and sophisticated surveillance equipment, enabling continuous monitoring of the area between the building and the fence which surrounds it. Special Agent Quinn stated:

> * * * [I]n contrast to the White House and other official buildings of the United States, Secret Service personnel are prohibited by international law and comity from entering onto the premises of a foreign embassy, legation, or consulate except with the expressed prior approval of the foreign government. Consequently, at such locations, the Secret Service has no centrally located defensive command center, has a minimal amount of intrusion detection equipment at its disposal, and, perhaps most important, has no secondary or fall-back defensive position which would otherwise be available if the Secret Service were permitted to position personnel inside the protected premises.

(A.22a).

In deciding whether the regulation of demonstrations provided in § 22-1115 was constitutional, the court of appeals considered the "core" of the case to be "the relationship between the United States' national interests and international obligations and the first amendment's guarantee of free speech" and whether § 22-1115 achieves a "permissible accomodation between the claims of these profound constitutional values." (A.8a)

The court found a compelling governmental interest in prohibiting demonstrations against foreign governments at their

embassies. That compelling interest arises from the interest of the United States in protecting its embassies and diplomats abroad, and from its obligations under international law to protect foreign missions and diplomats from intimidation, from potential violence, and from assaults on the dignity and peace of the mission.

The court noted that the right to demonstrate may be made to depend on the site of the protest, citing decisions of this Court which upheld prohibitions of demonstrations at courthouses and prisons. The court wrote that, while the first amendment does not permit the shielding of U.S. government officials from protests, "[f]oreign ambassadors, in contrast, have no similar obligation to be accessible to public attack, and our polity does not have the same interest in ensuring that they are." (A.23a) The court also recognized, in light of the factual record outlined above, that reduced protection to foreign embassies would compound the risk that American diplomats overseas are already under. (A.23a-24a). However, the court considered the most fundamental consideration supporting limitations on hostile demonstrations to be the government's obligations under international law, including, particularly, the 1961 Vienna Convention. (A.24a) These considerations distinguish demonstrations in front of a foreign embassy from those in front of the White House or other United States' government buildings. (A.24a).

The court found § 22-1115 to be a reasonable accommodation between these compelling governmental interests, on the one hand, and the first amendment, on the other, because the section "imposes only a very minor geographic limitation on speech" that could not be served with a statute "that had any significantly smaller impact on speech." (A.24a). The court stated:

> The statute that Congress has crafted proscribes an opposition demonstration only within a narrowly defined locus. Plaintiffs are free under section

22-1115 to hold an anti-Soviet demonstration anywhere in the city but within 500 feet of the Soviet Embassy. Appellants presumably feel that the embassy location would generate heightened visibility and best help them succeed in getting their message across. But the first amendment does not guarantee an optimal setting for speech; there is no right to the backdrop most interesting to press photographers or television cameramen. See *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *Adderly* v. *Florida*, 385 U.S. [39] at 47-48; *White House Vigil for the ERA Committee* v. *Clark*, 746 F.2d [1518] at 1520, 1538 (D.C. Cir. 1984). Inevitably, many of the most desirable places to demonstrate will be buildings and areas that for other reasons require special protective measures. We think Congress has met an unusually difficult problem with a balanced attempt to restrict no more speech than necessary.

(A.24a); footnote omitted.

REASONS FOR DENYING THE WRIT

I. The consistency between the decision of the court of appeals and prior decisions going back fifty years, and the purely local applicability of the statute counsel denial of the writ.

There is no need for a decision from the Court concerning the power of Congress to prohibit hostile demonstrations against foreign governments in the vicinity of their embassies in the District of Columbia. The court of appeals' decision in this case is in full accord with its own prior decisions and with district court decisions going back fifty years that have previously sustained the constitutionality of § 22-1115. Those decisions have also held that compelling reasons support the limited geographical prohibition against demonstrations that

Congress imposed.[3] The uniformity of these decisions strongly indicates the correctness of the decision in this case.[4]

Section 22-1115 is applicable only in the District of Columbia where the principal missions of foreign governments are located. The limited geographical reach of the statute, which addresses problems unique to the District, makes the case far less important than when the constitutionality of national legislation is questioned. Moreover, only courts in the District of Columbia are called upon to construe the statute. Thus a decision from this Court would have limited value to other lower federal courts and to state courts.

II. Compelling national interests in the conduct of foreign policy and in meeting obligations under international law permit Congress to impose the limited restrictions of D.C. Code §§ 22-1115 and 22-1116.

The statute at issue in this case, D.C. Code § 22-1115, is of compelling importance to the United States in terms of its

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[3] *Frend* v. *United States*, 69 App. D.C. 281, 282-83, 106 F.2d 691, 692-93 (1938), *cert. denied*, 306 U.S. 640 (1939); *Zaimi* v. *United States*, *155 U.S. App. D.C. 66, 476 F.2d 511 (1973)*; *Jewish Defense League* v. *Washington*, *347 F. Supp. 1300 (D.D.C. 1973) (three-judge court)*; *Jews for Urban Justice* v. *Wilson*, 311 F. Supp. 1158 (D.D.C. 1970).

[4] In *Concerned Jewish Youth* v. *McGuire*, 621 F.2d 471 (2d Cir. 1980), *cert. denied*, 450 U.S. 913 (1981), the court upheld similar restrictions imposed by New York City against demonstrations at the Soviet United Nations Mission. The restrictions permitted twelve demonstrators in a small area called the "bull pen" 118 feet accross the street from the Mission.

Petitioners argue that the court of appeals decision in this case conflicts with *CISPES* v. *F.B.I.*, 770 F.2d 468 (5th Cir. 1985). (Pet. at 14). However, *CISPES* simply construes a statute, 18 U.S.C. § 112, that is applicable only outside the District of Columbia. It addresses problems that are substantially different from those in the District due to the District's unique concentration of embassies and because Congress, as a matter of policy, chose to share responsibility for protection with state and local officials, including the authority of state governments to set stricter controls than § 112. *Concerned Jewish Youth* v. *McGuire*, *supra*, 621 F.2d at 478. *CISPES* does not conflict with the decision in this case; it simply deals with different problems and a different statute.

ability to conduct foreign affairs. Common sense tells us that a daily barrage of hostility by Americans at the door-steps of foreign embassies, such as calling foreign emissaries "killers", would strain relations with even the most tolerant of foreign governments, many of which do not have reputations for tolerance. Moreover, permitting the unrestrained hostile demonstrations petitioners seek would eviscerate the ability of the United States to perform its obligations under customary international law and § 22 of the Vienna Convention on Diplomatic Relations, which require that a host government prevent the disturbance of peace at foreign missions and protect the dignity of foreign missions and foreign diplomats. *Supra*, n.2. The Vienna Convention simply recognizes the reality that foreign relations cannot realistically be conducted against a daily backdrop of hostility by citizens of the host country at a foreign embassy.

The uncontested factual record in this case establishes that § 22-1115 serves other, related, national interests in the conduct of foreign affairs. The 500-foot buffer zone that the section imposes between embassies and hostile demonstrators gives police and Secret Service personnel a realistic opportunity to perform the international law obligation of protecting the safety of foreign embassies and other missions when demonstrations erupt into violence. The zone gives protective personnel an area in which to operate that they have indicated is absolutely essential to the performance of their protective functions. The zone is needed because police cannot enter the grounds of foreign embassies without invitation. And, certainly, foreign governments should not be put to the choice between inadequate security and a United States presence on the grounds of their embassies.

The uncontested record evidence also indicates that reduced security to foreign missions here would lead to reciprocal actions abroad in the form of reduced security to our diplomats and embassies in other countries. Our diplomats are already at serious risk in many places; there is a strong national interest in insuring that that risk not be increased.

The court of appeals ruled that these national interests are compelling and fully justify the "minor geographical limitation on speech" Congress imposed in § 22-1115. (A.24a) Virtually all of the grounds on which petitioners seek certiorari proceed on the premise that the Court should ignore these strong national interests. Petitioners assert that "our government has no legitimate interest" in prohibiting hostile demonstrations against foreign governments in front of their embassies. (Pet. at 10). That position is untenable.

Compelling national interests in conducting foreign affairs with a degree of civility; in meeting our international obligations; and in insuring the safety of foreign embassies here and our diplomats and missions abroad clearly permit the restrictions imposed by Congress in § 22-1115. The Court has repeatedly recognized that compelling governmental interests permit content-based exclusions of speech from public forums. *E.g., United States* v. *Grace, 461 U.S. 171, 177 (1983); Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983); *Carey* v. *Brown*, 447 U.S. 445, 461, 464-65 (1980); *Widmar* v. *Vincent*, 454 U.S. 263, 269-70 (1981). The uncontested record evidence is that the prohibition imposed by § 22-1115 (the 500 foot buffer zone) is narrowly tailored to the compelling national interests which the statute is designed to protect. *Perry Education Assn* v. *Perry Local Educators Assn., supra; Carey* v. *Brown, supra.* Those national interests do not require that demonstrations of hospitality or support of foreign governments be similarly controlled.

The decision of the court of appeals that Congress has reached a permissible balance between compelling national interests and the first amendment is not inconsistent with any decision of this Court. The Court's decisions permit the limited restrictions on speech imposed by § 22-1115 in light of the compelling national interests outlined above.

III. The labor exemption on picketing does not warrant relief to petitioners.

Relying on *Carey* v. *Brown, supra*, and *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972), petitioners contend that they are denied equal protection because §§ 22-1115 and 22-1116 expressly permit labor picketing directed at a bona fide labor dispute over activities of a foreign government on its mission grounds. (Pet. at 15-16) The court of appeals rejected this contention for the reasons given by the three-judge court in *Jewish Defense League* v. *Washington*, 347 F. Supp. 1300 (D.D.C. 1972). (A.48a n. 19) The three-judge court distinguished the situation in *Mosely* from a context such as that involved in this case on several grounds.

Labor picketing does not involve the same foreign government interests that other picketing does. It involves the foreign mission's domestic activities at the building being picketed. It may not directly involve the foreign government at all but, instead, a United States' contractor hired by the foreign government and is therefore not as likely to be offensive to foreign governments as other picketing. Thus, the reasons here for prohibiting hostile picketing challenging the domestic or international policies of foreign governments do not apply, or do not apply with the same force, to labor picketing. 347 F. Supp. at 1301-02. The court additionally ruled that, in light of the strong national interests that support §§ 22-1115 and 22-1116, Congress would undoubtedly want courts to treat the labor exemption as severable if necessary to save the entire statute from being held unconstitutional.

In our view, any possible infirmities in the labor exemption do not warrant exercise of certiorari jurisdiction in this case.

IV. Petitioners' other arguments do not warrant grant of the writ.

1. The court of appeals gave a limiting construction to the second portion of §§ 22-1115 concerning the authority of police officers to order dispersal of people congregating within 500 feet of an embassy. The court of appeals ruled that this authority may be exercised "only when the police reasonably believe that a threat to the security or peace of the embassy is present." (A.43a) The court said "the purposes of the statute supply the necessary criteria [for a dispersal order] just as much as a 'breach of the peace' ordinance does." (*Id.*)

We believe the action taken by the court of appeals to be eminently correct and proper. However, petitioners assert that the court exceeded its bounds and should have found the entire portion of the statute unconstitutional, striking it, rather than offering a limiting construction. (Pet. at 18-19). In any event, a limiting construction given by the court of appeals to a local Dictrict of Columbia statute does not present an occasion for the Court to exercise certiorari jurisdiction.

2. Petitioners also assert that there have been dispersal orders or arrests by police concerning activities not covered by the statute. (Pet. 16-19). Petitioners prevailed on this point below, and the court remanded the case for a hearing on those contentions. This aspect of the case is hardly ripe for review, and the Court could provide no more relief than was granted by the court below.

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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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OPPOSITION

BRIEF

Supreme Court, U.S.
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CLERK

(4)

No. 86-803

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

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v.

Marion S. Barry, Jr., Maurice T. Turner,
The Distict of Columbia and
Father R. David Finzer,

Respondents.

RESPONDENT, FATHER R. DAVID FINZER'S, BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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10 pp

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	8

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

No. 86- 803

Michael Boos, J. Michael Waller and
Bridget Brooker,

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v.

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RESPONDENT, FATHER R. DAVID FINZER'S, BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondent, Father R. David Finzer, was an appellant in the United States Court of Appeals for the District of Columbia; in fact, Father Finzer was the lead-name plaintiff therein. Father Finzer whole heartedly supports the Petition for a Writ of Certiorari despite having been omitted as a named petitioner in this appeal.

STATEMENT OF THE CASE

Respondent, R. David Finzer was the National Chairman of the Young Conservative Alliance of America, Inc. ("YCA"), which has been described "as an organization of younger citizens who held conservative views, and are dedicated to advocating and furthering their viewpoints." (App.4a)

YCA specializes in conducting political demonstrations. It is such a YCA organized demonstration which gave rise to the litigation below and the instant appeal. None of the petitioners herein had any official capacity with YCA.

Respondent Finzer and petitioners wish peacefully to display flags, banners, placards, and devices which depict messages critical of various foreign governments and their acts and policies, and to do so on the public streets and the public sidewalks within 500 feet of official foreign buildings.

Respondent Finzer and petitioners are desireous of engaging in the peaceful exchange and expression of views on those public streets and public

sidewalks of the District of Columbia which have been foreclosed to them without regard to the content of those expressions.

Respondent Finzer and petitioners are being prohibited from peacefully carrying flags, banners, placards, and devices within 500 feet of official foreign buildings because of the threat of arrest or prosecution under D.C. Code Section 22-1115. Respondent Finzer and petitioners are also being prohibited from congregating within 500 feet of official foreign buildings because of the arrest or prosecution under the law.

Respondent Finzer and petitioners are young conservatives with active interests in political issues who wish to display signs critical of foreign governments on the public streets and sidewalks of the District of Columbia within 500 feet of the official buildings of those governments. Respondent Finzer and petitioners wish to display signs stating "SOLIDARITY" or "RELEASE SAKHAROV" near the Soviet Embassy and signs stating "STOP THE KILLING" near the Nicaraguan Embassy. Respondent Finzer and each

petitioner also wishes to congregate peacefully, with two or more other persons, on public streets or sidewalks within 500 feet of official foreign buildings.

Respondent Finzer and petitioners wish only to engage in the peaceful expression of views, and only on those District of Columbia streets and sidewalks open to the public. Respondent Finzer and petitioners have no desire to engage in any violence; to threaten, harass, intimidate or interfere with any foreign official; or to demonstrate on the private property of any foreign government. Respondent Finzer and petitioners are inhibited from peacefully picketing or congregating because of the threat of arrest or prosecution under D.C. Code Section 22-1115.

Section 22-1115 has two clauses. The first clause prohibits the display of signs or banners designed to bring a foreign government into "public disrepute" or "public odium" anywhere within 500 feet of its official buildings. The second prohibits individuals from congregating within the

500 foot area after having been ordered by the police to disperse.

Respondent Finzer and petitioners instituted an action in the district court seeking an injunction against enforcement of Section 22-1115, and a declaration that the statute was unconstitutional and otherwise unlawful. The district court had jurisdiction under 28 U.S.C. Sections 1343 and 1331. The district court entered summary judgment for the governmental respondents, concluding that the statute was in all respects constitutional (App.105a-110a).

The court of appeals affirmed (App.1a-54a), over a vigorous dissent (App.55a-102a). The court of appeals recognized that the first clause of Section 22-1115 proscribed only speech (i.e., the display of a picket sign) and not conduct (App.53a), and that the purpose of the statute was to prohibit only those demonstrations which a foreign government considered insulting or annoying (App.13a). However, it interpreted Congress' power under Article I, Section 8, of the Constitution to "define

and punish... Offences against the Law of Nations" as empowering Congress to legislate as necessary to bring the United States into compliance with rules governing the international community (App.9a). In particular, the lower court concluded that protecting foreign officials from speech they found insulting or offensive was a central component of the law of nations, and a compelling governmental interest which Congress could act to enforce pursuant to Article I, Section 8 (App.16a). The court also concluded that the statute was necessary to fulfill our obligations under "customary international law" and a treaty (App.18a), and that the First Amendment must be read in harmony with these fundamental principles of international law. Relying heavily upon its interpretation of Article 1, Section 8, the court below rejected Respondent Finzer's and petitioners' challenges that Section 22-1115 violates the First Amendment because it is viewpoint discriminatory (App.35a-36a), it is content based (App.36a-38a), it is not narrowly tailored to further a compelling governmental

interest (App.48a-51a), and it fails to leave open ample alternative channels of communication. The court affirmed the district court's rejection of Respondent Finzer's and petitioners' argument that the statute, read with its counterpart, violates equal protection because it allows insulting demonstrations by parties involved in labor disputes, but not others (App.48a, n.19). It also rejected Respondent Finzer's and petitioners' contention that the statute was unconstitutionally vague (App.39a-40a), and unconstitutionally overbroad (App.44a-48a). Finally, the lower court interpreted the second clause of the statute as applicable whenever the police reasonably believe that a threat to the security of the embassy is present and ruled that, so interpreted, the second clause suffers no constitutional infirmities (App.40a-43a).

REASONS FOR GRANTING THE WRIT

Respondent Finzer incorporates by reference petitioners arguments and statements regarding the

reasons the Writ of Certiorari should be granted in this cause.

Respondent Finzer includes himself and his organization at each juncture in which the term "petitioners" is employed or referenced.

CONCLUSION

Respondent Finzer urges the Court to grant the Petition for a Writ of Certiorari as numerous issues of Constitutional importance are raised and must be resolved by this Court with finality.

Respectfully submitted,

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JOINT

APPENDIX

Supreme Court, U.S.
FILED
APR 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-803

In the Supreme Court of the United States

October Term, 1986

MICHAEL BOOS, J. MICHAEL WALLER and BRIDGET BROOKER,

Petitioners,

v.

MARION S. BARRY, JR., MAURICE T. TURNER, THE DISTRICT OF COLUMBIA and FATHER R. DAVID FINZER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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Petition for Certiorari filed November 17, 1986
Certiorari granted February 23, 1987

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TABLE OF PARTS OF THE RECORD CONTAINED IN THE JOINT APPENDIX

		Page
1.	Relevant Docket Entries	1
2.	Declaration of Bridget M. Brooker	4
3.	Declaration of J. Michael Waller	7
4.	Declaration of Michael Boos	10
5.	Defendants' Statement of Material Facts As To Which There Is No Genuine Issue	13
6.	Declaration of David Fields	16
7.	Affidavit of Thomas D. Quinn	20
8.	Declaration of James E. Nolan, Jr.	24
9.	Affidavit of Deputy Chief John C. Connor (without attachment)	26
10.	Washington Post article, "Demonstrations Denouncing U.S. Policy Mounted in Moscow," October 2, 1984	31
11.	Press Release dated March 8, 1985 entitled "District Drops Charges in South Africa Case"	34

RELEVANT DOCKET ENTRIES IN THE COURTS BELOW

A.) Finzer, et al. v. Barry, et al., United States District Court for the District of Columbia (84-0899)

DATE 1984	NR.	PROCEEDINGS
Mar 22	1	COMPLAINT; appearance. (ml)
Mar 22	2	MOTION by pltffs. for Preliminary Injunction and for summary judgment; statement of material facts; memorandum of P&A's; declaration of Father David Finzer; declaration of J. Michael Waller; declaration of Michael Boos; declaration of Bridget M. Brooker. (ml)

• • •

May 7	7	MOTION by defts. for summary judgment; statement of material facts as to which there is no genuine issue; statement of material facts in dispute; memorandum of P&A's; attachment; copy of declaration of David Fields; copy of affidavit of Thomas D. Quinn; declaration of James E. Nolan, Jr.; affidavit of John C. Connor; table of contents. (ml)

• • •

May 14	9	ORDER granting motion of the United States for leave to participate as amicus curiae; directing that the United States may participate in this action as amicus curiae in all subsequent proceedings, including the filing of its memorandum in support of defts' motion for summary judgment and the filing of the declarations of senior Executive Branch officials. (N) (signed 5-11-84) GASCH, J. (ml)

• • •

May 18	13	MEMORANDUM ORDER filed 5-17-84 denying pltfs' motions for a Preliminary Injunc-

DATE NR. PROCEEDINGS

tion (which was treated by the Court as a motion for Temporary Restraining Order) and for summary judgment; granting motion of deft. for summary judgment. (N) GASCH, J. (ml)

• • •

May 18 15 NOTICE OF APPEAL by pltf from order entered on 5-18-84; $5.00 USDC fee and $65.00 USCA fee pad [sic] and credited to U.S. Treasury; copies of notice sent to: R. Craig Lawrence, Esq., AUSA and Linda Lazarus, Esq.

• • •

B.) United States Court of Appeals for the District of Columbia Circuit (84-5327)

DATE FILINGS—PROCEEDINGS

(B)05-22-84 Copy of notice of appeal and docket entries from Clerk, DC (n-3)

• • •

(J)06-19-84 15-Appellants' brief (p-19)

(J)06-19-84 7-Record excerpts (p-19)

• • •

(J)09-11-84 15-Appellee's (District of Columbia) brief (m-10)

• • •

(H)10-19-84 15-Appellants' reply brief (m-19)

(J)10-22-84 15-Brief of United States as amicus curiae (m-22)

• • •

(E)03-20-85 Per curiam order that the Court will take Judicial Notice upon consideration of appel-

DATE FILINGS—PROCEEDINGS

lants' motion to supplement the record, and of the press release dated March 8, 1985 entitled "District Drops Charges in South Africa Case." Wald and Bork, CJs, and Davis, CJ, Federal Circuit.

(C)08-19-86 Opinion for the Court filed by Circuit Judge Bork.

(C)08-19-86 Dissenting opinion filed by Chief Judge Wald.

(C)08-19-86 Judgment by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed in part, and this case is remanded all in accordance with the Opinion for the Court filed herein this date.

(C)08-19-86 Mandate order.

• • •

[Caption omitted in printing.]

DECLARATION OF BRIDGET M. BROOKER

1. I am Bridget M. Brooker. I am 20 years old. I am currently a student at Georgetown University in Washington, D.C.

2. I have worked for the Young Americans for Freedom. I have attended a Young Americas Foundation Summer School, and consider myself a political conservative.

3. On at least two occasions, I have been prevented from participating in a political demonstration on the public streets and sidewalks within 500 feet of an official foreign government building.

4. On one occasion, I attempted to participate in a demonstration in front of the Russian Embassy. I was stopped by a uniformed police officer who was hundreds of feet from the front of the Embassy. The officer told me that I could not wave the American flag on the sidewalk in front of the Russian Embassy.

5. The police officer also indicated that I could not stand in front of the Russian Embassy to say the Lord's Prayer.

6. I wish peacefully to exercise my rights to freedom of expression in the District of Columbia by expressing views which are, and will be, critical of the acts and policies of foreign governments.

7. In particular, I wish peacefully to carry banners, placards, signs and devices which depict messages critical of foreign governments, and their acts and policies. I wish to do so on the public streets and sidewalks in the District of Columbia, within 500 feet of the official buildings of the foreign governments whose acts and policies I intend to criticize.

8. I further wish to congregate, with two or more people, on the streets and sidewalks of the District of Columbia within 500 feet of official foreign buildings.

9. I am unable peacefully to express my views about foreign governments, and congregate within 500 feet of foreign buildings, because I have been advised that there is a District of Columbia law, D.C. Code §§ 22-1115, 1116, which makes it a crime to do so.

10. I have been advised that the District of Columbia Government has in the past enforced this law, and that I may be subject to a criminal prosecution for violating this law if I peacefully express my views, or congregate, within 500 feet of a foreign building.

11. I am prohibited from exercising my rights to demonstrate against foreign governments because of the threat of prosecution under this law.

12. I have no intention, or desire, to engage in any violence. I have no intention, or desire, to threaten, harass, intimidate or interfere with any foreign official.

13. I have no intention, or desire, to demonstrate on the private property of any foreign government. I intend to demonstrate, if allowed to do so, only on the public streets and sidewalks of the District of Columbia open to the public.

14. I will suffer irreparable injury, and will be prevented from exercising my rights to freedom of expression, if the District of Columbia law involved here may be enforced against me.

I declare, under penalty of perjury, that the foregoing is true and correct, to the best of my knowledge, information and belief.

Dated: 3/20/84

/s/ Bridget M. Brooker
BRIDGET BROOKER

[Caption omitted in printing.]

DECLARATION OF J. MICHAEL WALLER

1. I am J. Michael Waller. I am 21 years old, and a student at George Washington University in Washington, D.C. I am the Editor-in-Chief of the George Washington *Sequent*. This is a campus alternative newspaper, which expresses the conservative point of view on various issues.

2. I have written articles for *The Washington Times* and *Human Events* magazine. I am a member of the Board of Directors of Young Americans for Freedom and of the Young Conservative Alliance.

3. I am particularly interested in events occurring in Latin America. I speak Spanish, and have actually lived with soldiers of the Nicaraguan Democratic Force, the U.S.-backed democratic resistance fighters near Nicaragua's northern border.

4. I wish peacefully to exercise my rights to freedom of expression in the District of Columbia by expressing views which are, and will be, critical of the acts and policies of hostile foreign governments.

5. In particular, I wish peacefully to carry banners, placards, signs and devices which depict messages critical of hostile foreign governments, and their acts and policies. I wish to do so on the public streets and sidewalks in the District of Columbia, within 500 feet of the official buildings of the foreign governments whose acts and policies I intend to criticize.

6. I further wish to demonstrate in front of the Nicaraguan Embassy in Washington, D.C. I wish to carry a sign which is critical of the Sandinista Government, and

which contains the words in bold print "STOP THE KILLING."

7. I further wish to congregate, with two or more people, on the streets and sidewalks of the District of Columbia within 500 feet of official foreign buildings.

8. I am unable peacefully to express my views about foreign governments, and congregate within 500 feet of foreign buildings, because I have been advised that there is a District of Columbia law, D.C. Code §§ 22-1115, 1116, which makes it a crime to do so.

9. I have been advised that the District of Columbia Government has in the past enforced this law, and that I may be subject to a criminal prosecution for violating this law if I peacefully express my views, or congregate, within 500 feet of a foreign building.

10. I am prohibited from exercising my rights to demonstrate against foreign governments because of the threat of prosecution under this law.

11. I have no intention, or desire, to engage in any violence. I have no intention, or desire, to threaten, harass, intimidate or interfere with any foreign official.

12. I have no intention, or desire, to demonstrate on the private property of any foreign government. I intend to demonstrate, if allowed to do so, only on the public streets and sidewalks of the District of Columbia open to the public.

13. I will suffer irreparable injury, and will be prevented from exercising my rights to freedom of expression, if the District of Columbia law involved here may be enforced against me.

I declare, under penalty of perjury, that the foregoing is true and correct, to the best of my knowledge, information and belief.

Dated: March 8, 1984 /s/ J. Michael Waller
J. MICHAEL WALLER

[Caption omitted in printing.]

DECLARATION OF MICHAEL BOOS

1. I am Michael Boos. I am 24 years old.

2. I am currently the Program Director at the Young Americas Foundation. I have served as the Director of Projects for the Young Americans for Freedom, and have worked for the National Conservative Political Action Committee.

3. I am interested in expressing and furthering the conservative point of view on particular issues. I am especially interested in criticizing the acts and policies of various communist governments, including that of the Soviet Union, Nicaragua, and the Peoples Republic of China.

4. I wish peacefully to exercise my rights to freedom of expression in the District of Columbia by expressing views which are, and will be, critical of the acts and policies of foreign governments.

5. In particular, I wish peacefully to carry banners, placards, signs and devices which depict messages critical of foreign governments, and their acts and policies. I wish to do so on the public streets and sidewalks in the District of Columbia, within 500 feet of the official buildings of the foreign governments whose acts and policies I intend to criticize.

6. I further wish to demonstrate on the sidewalk in front of the Soviet Embassy in Washington, D.C. I want to carry a sign which disagrees with the acts and policies of the Soviet Government, a sign on which is printed in bold capital letters the word "SOLIDARITY."

7. I further wish to congregate, with two or more people, on the streets and sidewalks of the District of Columbia within 500 feet of official foreign buildings.

8. I am unable peacefully to express my views about foreign governments, and congregate within 500 feet of foreign buildings, because I have been advised that there is a District of Columbia law, D.C. Code §§ 22-1115, 1116, which makes it a crime to do so.

9. I have been advised that the District of Columbia Government has in the past enforced this law, and that I may be subject to a criminal prosecution for violating this law if I peacefully express my views, or congregate, within 500 feet of a foreign building.

10. I am prohibited from exercising my rights to demonstrate against foreign governments because of the threat of prosecution under this law.

11. I have no intention, or desire, to engage in any violence. I have no intention, or desire, to threaten, harass, intimidate or interfere with any foreign official.

12. I have no intention, or desire, to demonstrate on the private property of any foreign government. I intend to demonstrate, if allowed to do so, only on the public streets and sidewalks of the District of Columbia open to the public.

13. I will suffer irreparable injury, and will be prevented from exercising my rights to freedom of expression, if the District of Columbia law involved here may be enforced against me.

I declare, under penalty of perjury, that the foregoing is true and correct, to the best of my knowledge, information and belief.

Dated: March 13, 1984 /s/ Michael Boos
MICHAEL BOOS

[Caption omitted in printing.]

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Rule 56 Federal Rules of Civil Procedure, defendants submit the following statement of material facts as to which there is no genuine issue.

1. Section 22-1115 was enacted in 1937 to protect representatives of foreign governments and their embassies.

2. The United States is under a special obligation to take all appropriate steps to protect diplomatic personnel and premises pursuant to international treaties and U.S. statutory law. (See Declarations of David Fields and James E. Nolan, Jr.)

3. The special position of the District of Columbia as our Nation's Capitol distinguishes it from other cities in the United States and the security accorded the large number of embassies and missions here is given exceptionally close scrutiny by foreign governments. (See Declarations of David Fields and James E. Nolan, Jr.)

4. The security provided to foreign diplomatic personnel and premises in the District of Columbia has a great impact on the reciprocal protection afforded U.S. missions abroad. (See Declarations of David Fields and James E. Nolan, Jr.)

5. It is more difficult to provide security for foreign personnel and their embassies than to protect American leaders and governmental buildings because foreign embassies can only be protected from the outside. (*See* Dec-

larations of David Fields and James E. Nolan, Jr., and Affidavit of Thomas D. Quinn).

6. The 500 foot buffer zone is necessary to provide a reasonable measure of security to the foreign embassies and their personnel. (*See* Declaration of David Fields and Affidavits of Thomas D. Quinn and John C. Connor).

7. In the past three and one and half years, there have been 98 organized demonstrations which have been directed against embassies in the District of Columbia. (*See* Affidavit of John C. Connor).

8. Not all demonstrations are prohibited under Section 22-1115. Vigils or protests which do not involve the use of placards and banners and leafletting when the handout is not facially "odius" are allowed so long as the demonstrators do not congregate within the 500 foot perimeter. (*See* Affidavit of John C. Connor).

9. The 100 foot provision of 18 U.S.C. 112 does not apply in the District of Columbia.

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[Caption omitted in printing.]

DECLARATION OF DAVID FIELDS

I, David Fields declare as follows:

I am the Deputy Assistant Secretary of State for Security. In that capacity I am responsible on behalf of the Department of State for coordinating arrangements for security of foreign diplomatic personnel in the District of Columbia. In my official capacity I am familiar with 22 D.C. Code Sec. 1115 which governs demonstrations and other conduct within 500 feet of any building in the District of Columbia used by any foreign government as an embassy, legation, consulate or for other official purposes. It is important to the foreign policy interests of the United States to continue the protection of the provisions of the 22 D.C. Code Sec. 1115 for a number of reasons.

By international treaties and U.S. statutory law the United States is under a special obligation to take all appropriate steps to protect diplomatic personnel and premises. *See,* e.g.. Article 22(2) of the 1961 Vienna Convention on Diplomatic relations, 23 U.S.T. 3227, 3237, TIAS No. 7502 (Protection of Missions); 18 U.S.C. Sec. 112 (1976) (providing criminal penalties for harassment or assault of foreign officials).

Consistent with these international legal obligations 22 D.C. Code Sec. 1115 furthers our foreign policy interests, not only in the District of Columbia and the United States, but throughout the world. Foreign governments often look to the practice in the United States in determining the measure of protection due United States diplomatic personnel overseas. Consequently, the D.C. Code provi-

sion is important in maintaining the security and safety of our personnel abroad.

The special position of the District of Columbia as our Nation's Capital distinguishes it from other cities in the United States. The security and respect accorded the large number of embassies and missions in the District of Columbia are therefore given exceptionally close scrutiny by foreign governments. Consequently, what happens with regard to the security of foreign diplomatic personnel and premises here has a substantially greater impact on foreign relations, and specifically on the reciprocal protection afforded U.S. missions abroad, then is the case with respect to other U.S. cities. 22 D.C. Code Sec. 1115 significantly furthers the interests of the United States in this area of greater sensitivity.

On a practical level the provisions of 22 D.C. Code Sec. 1115 significantly enhance the security of foreign embassies and other foreign government buildings. As is evident from examining significant international news events over the past several years, international events can create high emotions and sharp feelings against foreign countries and governments. The recent taking of hostages at the United States Embassy in Iran is a significant example. Feelings on the part of most Americans were high, and gatherings or demonstrations by groups of Iranians drew spontaneous, and sometimes violent, counter-demonstrations by groups of Americans.

In such an atmosphere demonstrations near an embassy or other official foreign government building, even if they begin peacefully, can quickly become unruly and

violent. If demonstrations are permitted near the foreign government embassy or other building, it becomes a significant security risk to diplomatic personnel as well as to the building and grounds of that foreign government, if the demonstration turns violent. Another example of this problem occurred recently in connection with a demonstration near the Soviet Embssy here by a group of Afghans protesting the Soviet invasion of Afghanistan. The demonstrators broke through police lines, but due to the 500-foot distance separating them from the Embassy premises, police were able to re-establish control, making a number of arrests in the process, before the demonstrators could reach the building. Had the distance separating the demonstrators from the Embassy been less, the results probably would have been quite different, and property damage and personal injury to the embassy and its occupants might well have resulted with potentially serious consequences for U.S. foreign relations and the security of U.S. personnel overseas. Such instances indicate the importance of 22 D.C. Code Sec. 1115 in enabling us to fulfill our international legal obligations to provide security, safety and protection for diplomatic personnel as well as for the physical property of the foreign government.

In my experience and the experience of security officers who report to me, there is a significant difference in terms of effective security protection between the 500-foot distance provided in 22 D.C. Code Sec. 1115 and shorter distances such as the 100-foot distance provided in 18 U.S. Code Sec. 112. Shorter distances can vastly increase the risk of injury or disturbance from thrown projectiles, or of other types of injury or damage to protected persons or

property due to any loss of crowd control. In my view, given the considerations set forth above, including the special status of the District of Columbia as the Nation's Capital, maintenance of the ability of law enforcement officers in the District of Columbia to enforce a 500-foot separation distance between hostile demonstrators and a target foreign embassy or other office is critical to the maintenance of effective security for such foreign premises and their occupants.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 26 day of April 1984.

/s/ David Fields
David Fields
Deputy Assistant Secretary
of State for Security

[Caption omitted in printing.]

AFFIDAVIT OF THOMAS D. QUINN

I, Thomas D. Quinn, being duly sworn, hereby depose and say:

1. That in April of 1983 I was appointed to the position of Special Agent in Charge in the Office of Protective Operations of the United States Secret Service. In this capacity I am responsible for coordinating the activities of the United States Secret Service Uniformed Division which include the protection of (1) the Executive Mansion and grounds in the District of Columbia; (2) any building in which Presidential offices are located; (3) the President and members of his immediate family; (4) foreign diplomatic missions located in the metropolitan area of the District of Columbia; (5) the temporary residence of the Vice President and grounds in the District of Columbia; (6) the Vice President and members of his immediate family; and, (7) certain other diplomatic missions located in metropolitan areas other than the District of Columbia. In my official capacity, I am familiar with section 22-1115 of the District of Columbia Code, which governs demonstrations and other conduct within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative as an embassy, legation, consulate. or for other official purposes.

2. In many respects the obstacles confronting the Secret Service in providing security for foreign embassies, legations and consulates are much greater than those encountered in protecting personnel and property of the

United States. At the White House and at the residence of the Vice President, for example, the Secret Service maintains a presence inside the structures which enables it to deploy a defensive network consisting of a number of manned perimeter posts radiating out from a centralized command center. The Secret Service's permanent on-site presence has also facilitated the installation of sophisticated surveillance equipment which enables Secret Service personnel to continuously monitor the area between the building and the fence which surrounds the site. Although the task of insuring the safety of the White House complex and the residence of the Vice President is extremely difficult, it would be impossible were the Secret Service subject to the same legal constraints that control Secret Service operations at foreign embassies, consulates, and legations.

3. The structures which house the diplomatic operations of foreign nations provide a tangible focal point to those wishing to demonstrate against the policies of the foreign government. Recent events underscore the fact that demonstrations near embassies or other official foreign government buildings, even if initially peaceful, exacerbate tensions and often lead to violent confrontations between the police and demonstrators. However, in contrast to the White House and other official buildings of the United States, Secret Service personnel are prohibited by international law and comity from entering onto the premises of a foreign embassy, legation, or consulate except with the expressed prior approval of the foreign government. Consequently, at such locations, the Secret Service has no centrally located defensive command center, has a

minimal amount of intrusion detection equipment at its disposal, and, perhaps most importantly, has no secondary or fall-back defensive position which would otherwise be available if the Secret Service were permitted to position personnel inside the protected premises.

4. In this context, it becomes clear that the 500 foot buffer as provided by section 22-1115 of the District of Columbia Code is essential if the Secret Service is to be able to provide a minimally acceptable level of security for foreign diplomatic personnel and property located in the District of Columbia. Yet as important as section 22-1115 is to the safety and well-being of foreign diplomatic personnel, it also serves to protect demonstrators and security personnel as well. The killing of a British policewoman and the wounding of a number of peaceful protestors in front of the Libyan embassy in London on April 16 of this year underscore the importance of keeping demonstrators a safe distance away from diplomatic missions. While it may be that demonstrators have the option to jeopardize their own personal safety in order to express their views, security personnel who must always position themselves as a protective buffer between demonstrators and the occupants of a protected premises do not. As the incident in London demonstrates, the police can be literally caught in the crossfire—with tragic results.

5. The need for the 500 foot rule is particularly acute in the District of Columbia, which like London, is a national capitol. The sheer number of, and the high visibility of, diplomatic embassies and missions located in the nation's capitol distinguish Washington, D.C. from other cities in the United States, and may account for the fact that while

the Secret Service is authorized by Congress to protect all foreign diplomatic missions located in the metropolitan area of the District of Columbia, its authority to protect such missions outside the Washington, D.C. area is much more restricted. *See* 3 U.S.C. § 202.

6. District of Columbia Code section 22-1115 constitutes a vital element in the ability of the Secret Service to successfully carry out its protective mission as it pertains to foreign embassies and missions located in the District of Columbia. The 500 foot rule as set forth in the District of Columbia Code strikes a carefully calculated balance between a demonstrator's right to freely express his or her views and the need of the government to assure that the missions and embassies of foreign countries located in the District of Columbia remain secure and inviolate. Although the occupants of foreign diplomatic missions in the District of Columbia have been traditionally identified as the principle beneficiaries of the protections afforded by section 22-1115, recent events make it clear that a confrontation in close proximity to foreign missions is fraught with danger for others as well. Regardless of whether the tragedy in London was the result of premeditated action or merely panicked response, it clearly demonstrates the need to maintain a legally enforceable buffer between antagonists. It is my opinion and the position of the United States Secret Service that any diminution of 22 D.C. Code § 1115 is untenable in view of the very real threat to human life that would result.

[executed and sworn April 24, 1984]

[Caption omitted in printing.]

Declaration

I, James E. Nolan, Jr., am Director of the Office of Foreign Missions, Department of State. As such, I am charged with implementing and carrying out the provisions of the Foreign Missions Act (Title II of P.L. 97-241, 22 USC 4301 et seq.).

Section 201(b) of the Act, the Declaration of Findings and Policy reads, in part, as follows, "The Congress declares that it is the policy of the United States to support the secure and efficient operation of United States missions abroad, [and] to facilitate the secure and efficient operation in the United States of foreign missions . . ."

I am familiar with the provisions of 22 D.C. Code 1115 which govern demonstrations and other conduct within 500 feet of any building in the District of Columbia used by a foreign government as an embassy, legation, consulate or for other official purposes. I am also familiar with the provisions of Article 22(2) of the Vienna Convention on Diplomatic Relations (1961), 23 U.S.T. 3227, TIAS No. 7502, which deals with the protection of missions, and the provisions of 18 USC 112 (1976), which provide criminal penalties for harassment or assault of foreign officials.

In my judgment it is not only consistent with U.S. treaty obligations and federal law, but essential to the foreign policy interests of the United States Government and the effective operation of the Office of Foreign Missions as expressed by Congressional intent that the 500 foot provision of 22 D.C. Code 1115 remain viable and operative.

The best way to support the secure operation of U.S. missions abroad is to provide, to the best of this country's

ability, effective security to foreign missions located here. To compromise on the security provided to foreign missions here is to compromise on the security of our personnel in our missions overseas. What happens in terms of security provided to foreign diplomatic personnel and premises here has a direct impact on the protection afforded U.S. missions and personnel abroad.

Department of State Security Officers at our embassies abroad seek host government cooperation in establishing police-enforced demonstration proximity limits at maximum distances from American facilities. Most governments are forthcoming in granting these requests. In other countries where groups are permitted to demonstrate near American facilities, we have suffered the unfortunate consequences of personal injury and property damage. Any diminution in the zone of safety afforded foreign missions in this country could have an adverse impact upon the continued willingness of other governments to establish maximum buffer zones.

On the basis of the above I would be strongly opposed to any efforts to dilute security provided to foreign diplomatic personnel and premises, and believe that to do so would be contrary to the Congressional mandate in the Foreign Missions Act, and could, in similar fashion, subject U.S. personnel and missions abroad to a greater possibility of injury due to a reduction of security provided for them.

I declare, under penalty of perjury, that to the best of my knowledge and belief, the foregoing statements are true and correct.

May 1, 1984 /s/ James E. Nolan

[Caption omitted in printing.]

AFFIDAVIT OF DEPUTY CHIEF JOHN C. CONNOR

DISTRICT OF COLUMBIA, ss:

John C. Connor, being first duly sworn under oath, deposes and says as follows:

1. I have been employed as a police officer in the Metropolitan Police Department of Washington, D.C. since February 25, 1957.

2. I am currently a Deputy Chief of Police. Since August of 1980, I have been the Commanding Officer of the Special Operations Division.

3. The Special Operations Division of the Metropolitan Police Department is responsible for policing all demonstrations that occur in the District of Columbia, including those aimed at foreign governments. In addition, the Special Operations Division conducts "security surveys of high risk targets to prevent terrorist attacks on buildings and personnel," and "[s]upport(s) the U(nited) S(tates) Secret Service as requested in the protection of foreign missions and embassies." General Order 101.10, Part II (Field Operations Bureau), subpart C, p. II-16 (effective April 29, 1979, and Revised April 15, 1984), attached hereto as Attachment "A" and incorporated by reference herein. See also, Org. Ord. No. 153, Appendix to Title I of the D.C. Code, pp. 222-223 (1973 ed.).

4. The Special Operations Division is responsible for enforcing D.C. Code 1981, § 22-1115.

5. Because of the close physical proximity of embassies and chanceries with other buildings, and particularly in view of the fact that many of the embassies in the District of Columbia are situated in a relatively condensed area of ten to fifteen (10-15) city-blocks, the "500 foot" proviso of § 22-1115 has been found through experience to be a reasonable perimeter for security purposes. It permits a necessary zone for police response in those instances when the perimeter is breached. Of course, embassy properties, as well as other structures which house diplomatic operations, are held to be inviolate (even to the police), unless permission to enter is granted by the diplomatic official in charge. Therefore, a zone of 500 feet is necessary to protect the embassies and diplomatic personnel because there is no secondary (or fall back) defensive position available to personnel inside the protected premises. The security problem is exacerbated further by landscaping, shrubbery, abutting properties and foliage which may provide hiding places for persons intent on disruption.

6. The amount and nature of police protection is dictated by the size of the demonstration, its stated purposes, and the risk that the embassy may be a target. As a result, additional preventive protection in the form of more police officers on occasions must be employed to insure the inviolability of the premises.

7. There have been approximately eleven (11) organized demonstrations which have been directed against embassies in the District of Columbia thus far in the calendar year 1984. In one of those demonstrations, arrests resulted when demonstrators refused to observe the "500 foot" demarcation, and attempted to physically assault the protected premises. In calendar year 1983, there were approximately thirty-eight (38) organized demonstrations

against various embassies; approximately twenty-one (21) organized demonstrations in calendar year 1982; and approximately twenty-eight (28) organized demonstrations in calendar year 1981.

8. Not all demonstrations are prohibited under § 22-1115. Vigils or protests which do not involve the use of placards or banners, and leafletting when the handout is not facially "odius", are allowed so long as the demonstrators do not congregate in mass within the "500 foot" perimeter. For example, there has been a constant vigil on the steps of the Phillip Murray building which is within 500 feet of the Russian Embassy since approximately 1970, in order to bring to public attention the plight of Soviet Jews. Similarly, there was a candlelight vigil conducted by various Americans across the street from the Iranian Embassy from November, 1979 through the early months of 1980, to protest the taking of American hostages in Iran.

9. During any demonstration which may pose any substantial likelihood of a breach of the peace or violence through confrontation, the General Counsel's Office of the Metropolitan Police Department is constantly available and physically present for legal advice and guidance. On special occasions, additional counsel is available through the Law Enforcement Section of the Office of the Corporation Counsel or through the Civil Division of the United States Attorneys Office for the District of Columbia. Sometimes, attorneys from the Intake/Grand Jury Section of the United States Attorneys Office are also available on the street for consultation and guidance.

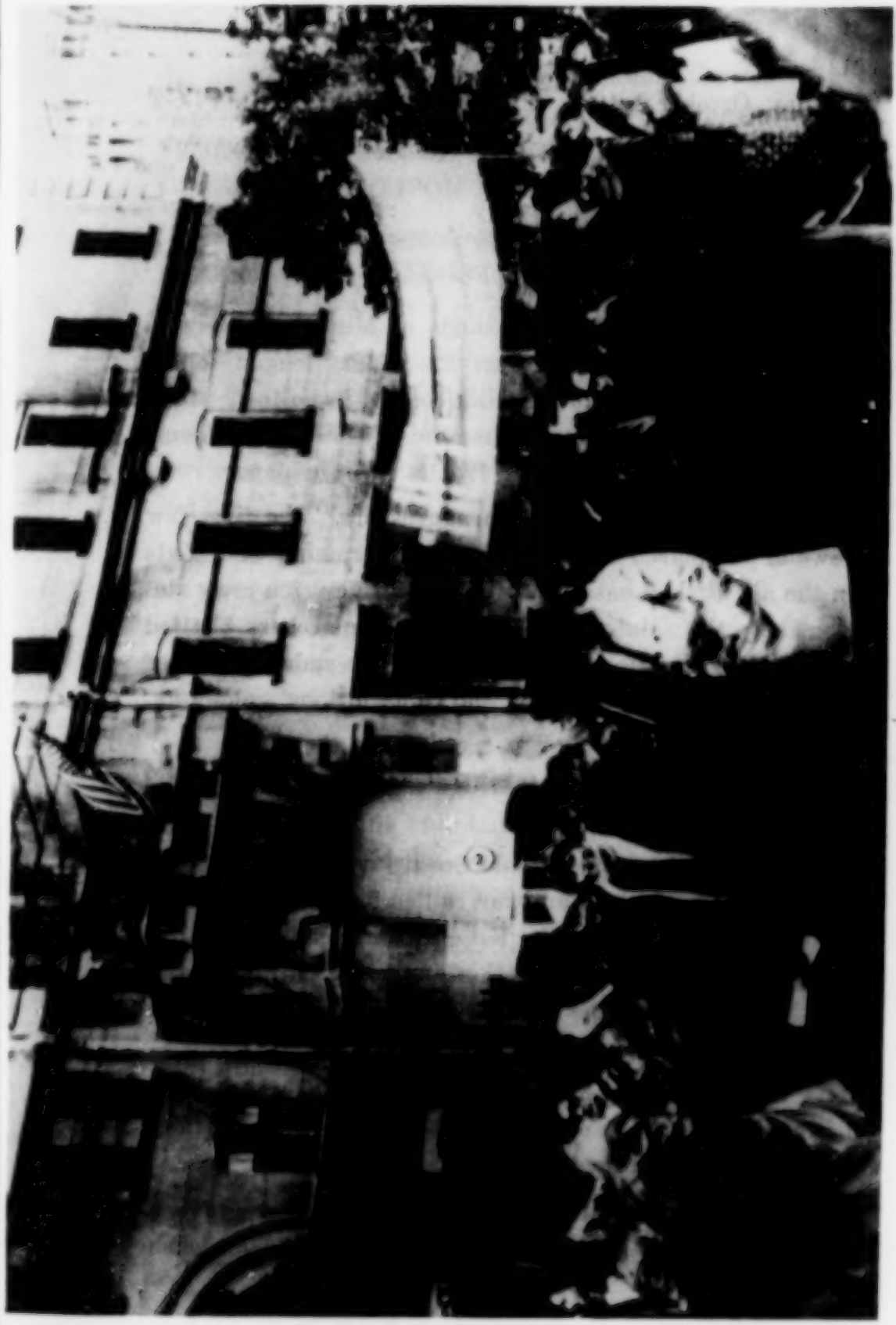
10. Based on my years of police experience, and in particular on my nearly four years of direct experience as Commander of the Special Operations Division, it is my professional judgment that the "500 foot" protective zone is reasonable and necessary to fulfill the stated objectives of D.C. Code 1981, § 22-1115. It is also consistent with international conventions such as the 1961 Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, 3237, TIAS No. 7502. Indeed, recent violent events in London, England involving the Syrian and Libyan Embassies, and sporadic incidences in Washington, D.C. and its surrounding jurisdictions, underscore the importance of having a protective zone. These local incidents include the seizure of an office building in McLean, Virginia on December 22, 1982, by Libyan students armed with clubs (See, Washington Post, December 23, 1982); the temporary takeover and ransacking of the Iranian Interest Section of the Algerian Embassy, 2139 Wisconsin Avenue, N.W., Washington, D.C. on August 8, 1981, during which a demonstrator was shot and other demonstrators and Interest Section personnel were beaten and injured; and finally, the temporary takeover of the Nicaraguan Embassy/Chancery, 1627 New Hampshire Avenue, N.W., Washington, D.C. on July 19, 1978, during which two members of the Uniformed Division of the Secret Service were injured. Because of these incidents, it is my conclusion that but for the the existence of the "500 foot" provision of § 22-1115, foreign embassies and other diplomatic structures in the District of Columbia and foreign diplomatic personnel can become targets of attack which members of this Department and the United States Secret Service would be powerless to prevent. Therefore, the "500 foot" buffer provides a security zone

which has an immense deterence effect for potential assailants.

12. This declaration is made with full knowledge and appreciation of the penalties which attach to false statements and declarations under the United States Code and the laws of the District of Columbia.

[executed and sworn May 7, 1984]

EXHIBIT A



As U.S. marines watch from a balcony, peace marchers file past U.S. Embassy in Moscow. Their banner says, "No to American rockets in Europe."

Associated Press

A16
Sunday, October 2, 1984 THE WASHINGTON POST

DEMONSTRATIONS DENOUNCING U.S. POLICY MOUNTED IN MOSCOW

By Michael Dobbs
Washington Post Foreign Service

MOSCOW, Oct. 1—Thousands of Muscovites demonstrated for peace and against President Reagan today. They were led by a stout militia colonel in uniform and a young man in a green anorak reading slogans like "Shame on the American aggressors" from a sheet of paper.

"Shame on the American aggressors," the first few rows of the march shouted in response, raising their fists in the air as they passed an American television crew stationed by the side of the road. Other marchers chatted about their plans for the weekend and the sudden burst of cold weather that has put an end to a glorious, golden autumn.

"The enthusiasm appears to end about 10 rows back," remarked a western resident.

This was the scene outside Gorki Park today in one of 15 officially organized antiwar rallies in Moscow called to show public support for the Kremlin's attacks on U.S. foreign policy. With the exception of the big parades marking May Day and the 1917 Bolshevik Revolution, mass street demonstrations are very unusual here.

As it turned out, there were no surprises and the size of the marches was smaller than anticipated: a few thousand people per rally.

First to arrive at Gorki Park were the purveyors of hot coffee, cookies, and salmon sandwiches. Then came

the plainclothes security men identifiable by their neat haircuts, broad shoulders, and smart coats. They were followed by busloads of uniformed policemen and Young Communist volunteers.

A group of workmen appeared to affix blue peace flags on either side of the park's entrance and a banner reading: "Our policy is a policy of peace."

The Gorki Park marchers, meanwhile, were assembling in a square near the U.S. Embassy. After a brief rehearsal on how to shout "Peace yes, War no," they moved off carrying banners like "We resolutely rebuff the plans of NATO."

"No to American rockets in Europe," they chanted as they passed the embassy where the Stars and Stripes was waving forlornly in the breeze. The Marine guard detachment, dressed in civilian clothes, watched impassively from a balcony.

In fact, apart from the officially approved chants and a few catcalls by students, the peace marchers showed not the slightest inkling of hostility toward America or Americans. "What do we know about Americans—just what we read in the papers. That's all," one marcher remarked.

Having trudged all the way to Gorki Park, the marchers listened to speeches about peace by a worker, an intellectual and a western peace activist. Then they trudged back home again to watch reports of "mass peace demonstrations in Moscow" on television news. The official Soviet news agency Tass later said that half a million people had taken part in the demonstrations.

NEWS RELEASE

THE DISTRICT OF COLUMBIA
OFFICE OF THE PRESS SECRETARY
1350 E STREET, N.W.
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(202) 727-6224 (202) 727-6424

From the Office of the Mayor

FOR IMMEDIATE RELEASE JANUARY 8, 1985

DISTRICT DROPS CHARGES IN SOUTH AFRICA CASE

D.C. Corporation Counsel Inez Smith Reid announced today that the District will drop charges filed against five persons who were charged with crossing a police barricade during recent demonstrations at the South African Embassy.

Charges will be dropped against Congressman John Conyers and William Simons, president of the D.C. Teachers Union, who were arrested November 27. Charges also will be dropped against three union officials arrested December 4—Charles Perlik of the Newspaper Guild, Thomas Donahue of the AFL-CIO and Leon Lynch of the United Steel Workers of America.

Ms. Reid said:

"It would be untenable for the Office of the Corporation Counsel to prosecute these five individuals who demonstrated peaceably to call attention to the gross injustices which result from the South African policy of apartheid. We are aware that the United States Attorney for the District of Columbia has dropped charges against several of

those arrested at the South African Embassy. For us not to do so would set an inconsistent policy with respect to the prosecution of those arrested at the South African Embassy. Finally, no significant District of Columbia interest would be served by these prosecutions."

During recent demonstrations at the embassy, these five persons were charged under District laws while others arrested were charged under a federal law prohibiting demonstrations within 500 feet of an embassy.

For further information, the media may contact: Inez Smith Reid, 727-6248.

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
MAY 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-803

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL BOOS, J. MICHAEL WALLER and BRIDGET BROOKER,

Petitioners,

v.

MARION S. BARRY, JR., MAURICE T. TURNER, THE DISTRICT OF COLUMBIA and FATHER R. DAVID FINZER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Does the first clause of D.C. Code § 22-1115, which makes it a crime to display only those signs designed to bring foreign governments into "public odium" or "public disrepute", and applies everywhere within 500 feet of official foreign buildings in the District of Columbia, violate the First Amendment?

2. Does the Constitution allow Congress to pass a law prohibiting free speech, which would violate the First Amendment if passed for any other domestic or foreign relations purpose, solely because Congress has acted pursuant to the Article I power to define and punish offenses against international law?

3. Does the second clause of D.C. Code § 22-1115, which allows the police to disperse any congregation within the 500 foot zones for any reason, violate the First and Fifth Amendments either on its face or as narrowed by the Court of Appeals?

4. Do both clauses of D.C. Code § 22-1115 violate equal protection because the legislature has allowed parties to labor disputes, but not Petitioners, to participate in "odious" demonstrations and congregate within the 500 foot zones?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
1. Factual Background	2
2. Proceedings Below	4
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. THE FIRST CLAUSE OF THE STATUTE, WHICH PROHIBITS PEACEFUL POLITICAL FREE SPEECH IN PUBLIC FORUMS, VIOLATES THE FIRST AMENDMENT	8
A. The First Clause Prohibits Speech Based Solely On The Viewpoint Expressed	9
B. The First Clause Violates Other First Amendment Requirements	13
1. The Statute Prohibits Only Speech And No Dangerous Conduct	13
2. The Statute Severly Limits Free Speech	16
3. The Statute Is Vague	17
C. The Contrary Reasoning Of The Courts Below Is Unsound	20
II. THE ARTICLE I POWER TO PUNISH OFFENSES AGAINST THE LAW OF NATIONS DOES NOT ALLOW CONGRESS TO BAN PEACEFUL SPEECH INSULTING TO FOREIGN NATIONS	24

TABLE OF CONTENTS—Continued

	Page
A. The First Amendment Applies To The Power To Punish International Offenses Like All Other Powers	24
B. The Original Intent Of The Framers Confirms This Conclusion	26
C. Congress Has Concluded That The Power To Punish International Offenses Does Not Allow It To Ban Insulting Speech	28
D. International Law Does Not Require The United States To Protect Foreign Officials From Peaceful Political Insults	31
E. An Insult Free Interest Is Unrealistic and Unworkable	34
III. THE SECOND CLAUSE OF THE STATUTE, WHICH ALLOWS THE POLICE TO DISPERSE CONGREGATIONS, VIOLATES THE FIRST AMENDMENT, BOTH AS WRITTEN BY THE LEGISLATURE AND AS REWRITTEN BY THE COURT OF APPEALS	36
A. The Second Clause Is Unconstitutional As Written	36
B. The Court Of Appeals Lacked Authority To Rewrite The Second Clause	37
C. The Second Clause Is Unconstitutional Even As Rewritten By The Court Below	42
IV. BOTH CLAUSES VIOLATE EQUAL PROTECTION BECAUSE THEY ALLOW INSULTING SIGNS AND CONGREGATIONS BY PARTIES TO LABOR DISPUTES BUT NOT OTHERS	43
CONCLUSION	47
ADDENDUM	1a

TABLE OF AUTHORITIES

Cases:	Page
Adderly v. Florida, 385 U.S. 39 (1966)	20
Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)	33
Bolling v. Sharpe, 347 U.S. 497 (1954)	43
Brandenburg v. Ohio, 395 U.S. 444 (1969)	23, 24
Broadrick v. Oklahoma, 413 U.S. 601 (1973)	14, 15
Buckley v. Valeo, 424 U.S. 1 (1976)	36
Cantwell v. Connecticut, 310 U.S. 296 (1940)	25
Carey v. Brown, 447 U.S. 455 (1980)	9, 43, 44, 45
Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980)	14
CISPES (Committee in Solidarity) v. FBI, 770 F.2d 468 (5th Cir. 1985)	16, 35
Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981)	36
Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984)	9-10, 16
Coates v. Cincinnati, 402 U.S. 611 (1971)	19, 37
Cohen v. California, 403 U.S. 15 (1971)	12
Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974)	23
Connally v. General Constr. Co., 269 U.S. 385 (1926)	17
Connick v. Myers, 461 U.S. 138 (1983)	8
Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980)	11
Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 783, 105 S. Ct. 3439 (1985)	12
Cox v. Louisiana, 379 U.S. 536 (1965)	42
Cox v. Louisiana, 379 U.S. 559 (1965)	21
Davis v. Passman, 442 U.S. 228 (1979)	43
De Geofroy v. Riggs, 133 U.S. 258 (1890)	26
Dowling v. United States, 347 U.S. 207 (1985)	46
Edwards v. South Carolina, 372 U.S. 229 (1963)	9, 42
Erznoznik v. Jacksonville, 422 U.S. 205 (1975)	38
Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)	32, 34

TABLE OF AUTHORITIES—Continued

	Page
Frend v. United States, 100 F.2d 691 (D.C. Cir. 1938), *cert. denied*, 306 U.S. 640 (1939)	5, 15
Frolova v. Union of Soviet Socialist Republics, 588 F. Supp. 358 (N.D. Ill. 1983), *aff'd*, 761 F.2d 370 (7th Cir. 1985)	33
Goldwater v. Carter, 444 U.S. 996 (1979)	22
Gooding v. Wilson, 405 U.S. 518 (1972)	38
Grayned v. Rockford, 408 U.S. 104 (1972)	18, 38
Greer v. Spock, 424 U.S. 828 (1976)	21
Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939)	8
Hilton v. Guyot, 159 U.S. 113 (1895)	33
Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)	19
Hynes v. Mayor and Council of Oradell, 425 U.S. 610 (1976)	37
Jeannette Rankin Brigade v. Chief of Capitol Police, 342 F. Supp. 575 (D.D.C.), *aff'd*, 409 U.S. 972 (1972)	22, 25
Jewish Defense League, Inc. v. Washington, 347 F. Supp. 1300 (D.D.C. 1972)	45, 46
Key v. Doyle, 434 U.S. 59 (1977)	38
Kinsella v. United States, 361 U.S. 234 (1960)	26
Kolender v. Lawson, 461 U.S. 352 (1983)	18-19, 37, 38
Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977)	17
Lipkin v. United States (D.C. App. Nos. 86-190-86-198)	3, 41
Liparota v. United States, 471 U.S. 419 (1985)	46
M.A.P. v. Ryan, 285 A.2d 310 (D.C. App. 1971)	40
Martin v. Struthers, 319 U.S. 141 (1943)	17, 27
Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984)	10, 11, 14
NAACP v. Alabama, 357 U.S. 449 (1958)	36
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	25
New York Times Co. v. United States, 403 U.S. 713 (1971)	23
Palmore v. United States, 411 U.S. 389 (1973)	38

TABLE OF AUTHORITIES—Continued

	Page
Perez v. Brownell, 356 U.S. 44 (1958)	25
Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983)	11, 12, 14
Police Department of Chicago v. Mosley, 408 U.S. 92 (1972)	9, 20, 44, 45
Regan v. Time, Inc., 468 U.S. 641 (1984)	9, 46
Reid v. Covert, 354 U.S. 1 (1957)	22, 26, 27
Republica v. De Longchamps, 1 Dall. 111 (Pa. Oyer and Terminer) (1784)	33
Schacht v. United States, 398 U.S. 58 (1970)	22, 23, 26
Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984)	37
Shuttlesworth v. Birmingham, 394 U.S. 147 (1969)	37, 38
Smith v. Goguen, 415 U.S. 566 (1974)	18, 19, 37
Strinko v. United States (D.C. App. No. 85-1330)	3
Stromberg v. California, 283 U.S. 359 (1931)	18
Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 811 (1985)	32, 33-34
Terminello v. Chicago, 337 U.S. 1 (1949)	25
The Paquete Habana, 175 U.S. 677 (1900)	32
Thomas v. Collins, 323 U.S. 516 (1945)	27
Thornhill v. Alabama, 310 U.S. 88 (1940)	14
United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)	25
United States v. Grace, 461 U.S. 171 (1983)	8, 21, 25
United States v. O'Brien, 391 U.S. 367 (1968)	10
United States v. Thirty-Seven (37) Photographs, 302 U.S. 363 (1971)	38
United States v. Weber Aircraft Corp., 465 U.S. 792 (1984)	13
U.S. Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981)	8
Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980)	37
Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246 (D.D.C. 1985)	33

TABLE OF AUTHORITIES—Continued

	Page
Washington Mobilization Committee v. Cullinane, 566 F.2d 107 (D.C. Cir. 1977)	39
Watson v. Memphis, 373 U.S. 526 (1963)	43
Watts v. United States, 394 U.S. 705 (1969)	24-25
Widmar v. Vincent, 454 U.S. 263 (1981)	11
Williams v. District of Columbia, 419 F.2d 638 (D.C. Cir. 1969) (*en banc*)	40
Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)	12, 16, 25
Zaimi v. United States, 476 F.2d 511 (D.C. Cir. 1973)	13, 34, 37, 39, 45
Constitutional Provisions:	
U.S. Const. art. I	6, 7, 25, 26, 27
art. I, § 8, cl. 10	2, 4, 5, 6, 26, 30
art. I, § 8, cl. 17	9
art. VI	26
amend. I	*passim*
amend. V	2, 26, 43
amend. VI	26
amend. XIV	5
amend. XIV, § 1	2
Statutes and Regulations:	
18 U.S.C. § 112	2, 21, 35, 36
§ 112(b) (1973)	29, 30
§ 112(b) (1)	15
§ 112(b) (2)	15
§ 112(c) (1) (1973)	29
§ 112(e) (1973)	29
§ 1507	21
28 U.S.C. § 1254(1)	2
§ 1331	4
§ 1343	4
27 Stat. 323, ch. 320, § 6 (1892)	39
30 Stat. 723, ch. 638 (1898)	39
67 Stat. 98, ch. 159 § 211a (1953)	39
District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, Title I, § 111, 84 Stat. 475	38, 40

TABLE OF AUTHORITIES—Continued

	Page
Act for Protection of Foreign Official Guests of the United States, Pub. L. No. 92-539, Title III, § 301, 86 Stat. 1072 (1972)	29
Pub. L. No. 94-467, § 5, 90 Stat. 1999 (1976)	29, 31
Pub. L. No. 99-591, § 132, 100 Stat. 3341-192 (1986)	3
D.C. Code § 11-102	38
§ 22-1107	39, 40
§ 22-1115	*passim*
§ 22-1116	2, 43, 45, 46
§ 22-1121	39
§ 22-1121(2)	39
Police Line Regulation, Article IV, § 5a.(5)	39
Legislative Materials:	
S. Rep. No. 1105, 92d Cong., 2d Sess. 19 (1972)	29, 30
S. Rep. No. 1273, 94th Cong., 2d Sess. 8 (1976)	30
H.R. Rep. No. 1614, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. Code Cong. & Ad. News 4480	30
81 Cong. Rec. 8486 (1937)	5
81 Cong. Rec. 8519 (1937)	39
81 Cong. Rec. 8587 (1937)	22
81 Cong. Rec. 8588 (1937)	10
81 Cong. Rec. 8589 (1937)	17
81 Cong. Rec. 8590 (1937)	22
81 Cong. Rec. 8591 (1937)	10
81 Cong. Rec. 8592 (1937)	10
81 Cong. Rec. 8593 (1937)	10, 40
81 Cong. Rec. 31034 (1972)	41
122 Cong. Rec. 31033 (1972)	41
122 Cong. Rec. 31580 (Sept. 21, 1976) (statement of Rep. Hungate)	30
Miscellaneous:	
Bill of Rights	7, 26, 27
Declaration of Independence (U.S.C.A., Constitution, Vol. I)	28
1961 Vienna Convention on Diplomatic Relations	7, 29, 30, 31
Article 22.2	28

TABLE OF AUTHORITIES—Continued

	Page
23 U.S.T. 3227, T.I.A.S. No. 7502 (1961)	28, 31
3230, T.I.A.S. No. 7502 (1961)	28
28 U.S.T. 1975, T.I.A.S. No. 8532 (1976)	31
Restatement (Second) of the Law, Foreign Relations Law (1965 ed.):	
§ 1	32
§ 117	31
§ 117, Comment d	31
4 W. Blackstone, Commentaries 68 (1854)	32
Steiner and Vagts, Transnational Legal Problems (1968)	33
The New York Times, June 18, 1982, at A16, cols. 1-4	35
The New York Times, Sept. 2, 1983, at 1, col. 6	35
The Washington Post, March 17, 1987, at D4, col. 1	33
The Washington Post, April 30, 1987, at A42	20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-803

MICHAEL BOOS, J. MICHAEL WALLER and BRIDGET BROOKER,
Petitioners,
v.
MARION S. BARRY, JR., MAURICE T. TURNER, THE DISTRICT OF COLUMBIA and FATHER R. DAVID FINZER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. 1a-102a)[1] is reported at 798 F.2d 1450 (1986). The opinion of the United States District Court for the District of Columbia (App. 105a-110a) is unreported.

JURISDICTION

The judgment of the Court of Appeals (App. 103a-104a) was entered on August 19, 1986. The Petition for

[1] "App." means the Appendix to the Petition for a Writ of Certiorari. "J.A." means the Joint Appendix. "Pet." means the Petition for a Writ of Certiorari.

a Writ of Certiorari was filed on November 17, 1986, and was granted on February 23, 1987. ——U.S. ——, 107 S. Ct. 1282. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, Clause 10:

"The Congress shall have Power . . . ;

• • • •

"To define and punish Piracies and Felonies on the high Seas, and Offenses against the Law of Nations;"

The First Amendment:

"Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment:

"[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law;"

The Fourteenth Amendment, Section 1:

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The full text of D.C. Code § 22-1115 and § 22-1116, and 18 U.S.C. § 112, are set forth in the Petition for a Writ of Certiorari (at pp. 2-5).

STATEMENT OF THE CASE

1. *Factual Background.* Petitioners are three young political activists (J.A. 4, 7, 10). They wish peacefully to display signs and similar devices which depict messages critical of foreign governments on the public sidewalks in the District of Columbia within 500 feet of official foreign buildings (J.A. 4-5, 7, 10). For example, Petitioner Waller, who speaks Spanish and has lived

with the contras near Nicaragua, wishes to display a "STOP THE KILLING" sign in front of the Nicaraguan Embassy at 1627 New Hampshire Avenue, N.W. (J.A. 7-8). Petitioners Brooker and Boos wish to display signs bearing words such as "SOLIDARITY" or "RELEASE SAKHAROV" on the sidewalk in front of the Soviet Embassy at 1 Andrei Sakharov Plaza, N.W. (J.A. 4, 10; App. 107a).[2] Brooker once attempted to participate in a demonstration in front of the Soviet Embassy by waving the American flag on the sidewalk, but was stopped hundreds of feet away by a police officer (J.A. 4).

Each Petitioner further wishes to congregate, with two or more other people, on the streets and sidewalks of the District of Columbia within 500 feet of official foreign buildings (J.A. 5, 8, 11).

Petitioners have no intention, or desire, to engage in any violence; to threaten, harass, intimidate, or interfere with any foreign official; or to demonstrate on the private property of any foreign government (*id.*). Petitioners wish only to engage in a peaceful expression of views, and only on those District of Columbia streets and sidewalks open to the public (J.A. 4-5, 7-8, 10-11). Petitioners are prevented from peacefully displaying signs or flags, or congregating, because of the threat of arrest and/or prosecution under D.C. Code § 22-1115 ("§ 1115") (*id.*). Several cases are pending in the District of Columbia courts involving persons who have been arrested and convicted for violating § 1115 within 500 feet of the Soviet Embassy.[3]

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[2] By Act of Congress the proper address of the Soviet Embassy is No. 1 Andrei Sakharov Plaza. Pub. L. No. 99-591, § 132, 100 Stat. 3341-192 (1986). That statute also directed that at least three Andrei Sakharov Plaza signs be installed, including one directly in front of the Soviet Embassy. The District of Columbia government has erected and posted the signs, which are on permanent display.

[3] *E.g., Strinko* v. *United States* (D.C. App. No. 85-1330), and *Lipkin* v. *United States* (D.C. App. Nos. 86-190 to 86-198). Shortly

Section 1115 has two clauses. The first clause prohibits the "display" of signs or banners designed to bring a foreign government into "public disrepute" or "public odium" anywhere within 500 feet of its official buildings. The second prohibits individuals from congregating within the 500 foot area after having been ordered by the police to disperse (*see* Pet. 2).

2. *Proceedings Below.* Petitioners instituted this action in the District Court seeking an injunction against enforcement of § 1115, and a declaration that the statute was unconstitutional. The District Court had jurisdiction under 28 U.S.C. §§ 1343 and 1331. The District Court entered summary judgment for Respondents concluding that the statute was in all respects constitutional (App. 105a-110a). It reasoned that the statute was necessary to protect the security of foreign persons and property because demonstrations opposing foreign governments are more likely to become violent than supporting demonstrations (App. 109a).

The Court of Appeals affirmed on a different ground (App. 1a-54a). Judge Bork, joined by Judge Davis of the Federal Circuit, wrote for the majority. Judge Wald dissented (App. 55a-102a). In both courts below, Respondents (and the federal government as *amicus*) defended the first clause solely on a "security" rationale. At no time did they assert a governmental interest in protecting foreign officials from peaceful insults, or argue that Congress' power under Art. I, § 8, cl. 10 of the Constitution to "define and punish . . . Offenses against the Law of Nations" authorized a prohibition of peaceful speech which is insulting. The affidavits and declarations submitted by Respondents (J.A. 16-30) address only a purported governmental interest in security.

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after certiorari was granted on February 23, 1987, the District of Columbia Court of Appeals' Clerk's office advised counsel in those cases that oral arguments would be stayed until after this Court decided this case.

The opinion below begins with a discussion of Congress' legislative power to protect foreign officials from violence and intimidation (App. 9a). Bit by bit, it moves from that uncontested proposition to the radically different conclusion that Art. I, § 8, cl. 10 empowers Congress to prohibit peaceful political speech which insults or annoys foreign officials (App. 51a). In the end, the majority *sua sponte* upheld the first clause on the ground that Congress has the power to insulate foreigners from political insults or annoyance, and reaffirmed its earlier decision in *Frend* v. *United States*, 100 F.2d 691 (D.C. Cir. 1938), *cert. denied*, 306 U.S. 640 (1939) (App. 7a-8a).[4]

The majority recognized that the first clause of § 1115 did not prohibit violence but prohibits only speech (*i.e.*, the "display" of a picket sign) (App. 53a, 35a), and that its purpose was to prohibit only those demonstrations which a foreign government considered insulting or annoying (App. 13a, 37a-38a). However, it found in Congress' power under Art. I, § 8, cl. 10 of the Constitution to define and punish offenses against international law the authority to prohibit such demonstrations without violating the First and Fourteenth Amendments (App. 9a). In particular, the majority concluded that protecting foreign officials from insulting or offensive speech was a central component of the Law of Nations and a compelling governmental interest which Congress could act to enforce pursuant to Art. I, § 8, cl. 10 (App. 16a). The majority also concluded that the statute was necessary to fulfill American obligations under "customary in-

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[4] After Hitler annexed Austria in 1938, individuals were convicted for displaying banners intended to bring the German government into contempt. *Frend* held § 1115 was constitutional, and stated that if Congress lacked the power to prohibit such demonstrations the result "would be little less than fantastic." 100 F.2d at 694. Congress passed § 1115 to prohibit protests such as those which had occurred against Mussolini and Hitler. 81 Cong. Rec. 8486 (1937).

ternational law" and a treaty (App. 18a), and that the First Amendment must be harmonized with these fundamental principles of international law (App. 25a-26a).

Relying heavily upon its interpretation of Art. I, § 8, cl. 10, the majority rejected Petitioners' multiple First Amendment challenges to the first clause of the statute (App. 35a-40a, 44a-51a). The majority ruled that the second clause should not be interpreted as written or enforced by Respondents, but instead applies only when the police reasonably believe that a threat to the security or peace of an embassy is present (App. 43a); it concluded that, so construed, the second clause suffers no constitutional infirmities (App. 40a-43a). Like the District Court, the majority rejected Petitioners' argument that § 1115, read with its counterpart, violates equal protection because it allows insulting demonstrations and congregations by parties involved in labor disputes, but not others (App. 48a, and n. 19).

SUMMARY OF ARGUMENT

I. Peaceful political expression on streets and sidewalks is entitled to maximum First Amendment protection. Such expression is precisely what the first clause of § 1115 prohibits. The first clause violates the First Amendment because it is viewpoint discriminatory, and allows the government to censor political speech; it prohibits protected free expression but no dangerous conduct; it curtails most effective picketing against foreign governments in the District of Columbia; and defines criminal activity in terms—whether the message conveyed creates "public disrepute" or "public odium"—which are inherently vague. The first clause cannot be sustained under the strictures of First Amendment scrutiny this Court has consistently required when restrictions on free expression have been imposed.

II. The main ground of decision below was the majority's conclusion that the Article I power to define and

punish offenses against international law gives Congress the authority to restrict expression merely because it insults foreign officials or governments. The majority discovered in that rarely invoked Article I power a component not contained in any other governmental power. But decisions of this Court make clear that the Bill of Rights applies with as much force to governmental powers regulating foreign affairs as domestic affairs. The original intent of the framers and ratifiers as interpreted by this Court confirms that the First Amendment protects peaceful political insults. That conclusion is reinforced by the fact that Congress implemented the Vienna Convention of 1961—the only treaty relevant here—by enacting a nationwide federal statute which, in contrast to § 1115, outlaws conduct dangerous to foreign officials, but protects peaceful demonstrations which insult them. To the extent international law is relevant here, it recognizes that our government cannot enter into any international agreement without observing First Amendment limitations; and Respondents have not shown that any other country, let alone significant portions of the international community, has passed or enforced a law like § 1115 which prohibits speech but not dangerous conduct. Finally, in the modern world of international affairs, the insult free interest created by the majority is neither workable nor legitimate. Our high ranking governmental officials do not violate international law or compromise any legitimate interest when they make political speeches which insult foreign officials or governments; and such insults regularly occur both within and without the zones the majority below sought to make "insult free."

III. The second clause of § 1115 is unconstitutional on its face because it gives the police unlimited power to disperse any congregations in the 500 foot zones for any reason. Since the District of Columbia Court of Appeals has not narrowed the second clause, the majority lacked authority to do so, especially since its interpretation

makes the second clause duplicative of other laws on the books. Even as narrowed, the second clause still is unconstitutional because it allows the police to disperse all congregations whenever they believe a threat to "peace" or "security" is present, but does not further define or limit those terms.

IV. Both clauses violate equal protection because the counterpart to § 1115 allows labor picketers to engage in insulting demonstrations and congregations everywhere Petitioners and others cannot do so. Given this Court's prior equal protection decisions involving labor picketing exemptions, this is an *a fortiori* case.

ARGUMENT

I. THE FIRST CLAUSE OF THE STATUTE, WHICH PROHIBITS PEACEFUL POLITICAL FREE SPEECH IN PUBLIC FORUMS, VIOLATES THE FIRST AMENDMENT.

Petitioners are political activists who want to display picket signs with messages designed to increase support for the Nicaraguan contras and opposition to the policies of the Soviet Union. Political speech on matters of public concern occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection. *Connick* v. *Myers*, 461 U.S. 138, 145 (1983). Petitioners wish to picket on those public streets and sidewalks which are open to the public for all lawful purposes. Streets and parks "have historically been public forums", *U.S. Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 133 (1981), which "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions." *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496, 515 (1939). In such places, which occupy a "special position in terms of First Amendment protection", *United States* v. *Grace*, 461 U.S. 171, 180 (1983), the government's ability permissibly to restrict expressive activity "is very limited". *Id.* at 177.

And Petitioners wish to picket in the District of Columbia which is the "Seat of the Government of the United States . . . ." U.S. Const. Art. I, § 8, cl. 17. Petitioners therefore seek to exercise their free speech rights in their most highly protected form. *See Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963).

A. The First Clause Prohibits Speech Based Solely On The Viewpoint Expressed.

1. Section 1115 does not prohibit all "displays" of signs designed to communicate ideas. It prohibits only those communicative "displays" designed to bring a foreign government into "public disrepute" or "public odium" (App. 35a, 53a). Under this statute Petitioners are free to display in front of the Soviet Embassy a sign which states "WE SUPPORT GORBACHEV", but commit a crime if the sign states "WE CONDEMN GORBACHEV".

Content-based distinctions regulate speech or expression on the basis of general subject matters. For example, laws which permit speech on all subjects except religion, or all subjects except foreign relations, are content-based. However, they are not viewpoint discriminatory, because they prohibit all viewpoints about the banned subject matter. Viewpoint discriminatory laws pick and choose between points of view on the same subject matter. Laws which allow Lutherans but not Baptists to speak, or allow speech supporting foreign governments but not criticizing them, are viewpoint discriminatory. The first clause of § 1115 is viewpoint discriminatory, as the majority below acknowledged (App. 37a-38a).

2. The Court has held more than once that content-based but viewpoint neutral restrictions on expression violate the First Amendment. *Regan* v. *Time, Inc.*, 468 U.S. 641 (1984), struck down an exception to a counterfeiting statute solely because it was content-based. *Id.* at 648-649. *Accord, Carey* v. *Brown*, 447 U.S. 455, 461 (1980); *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95-96 (1972). *See, e.g., Clark* v. *Community for*

Creative Non-Violence, 468 U.S. 288, 293 (1984). Even when it comes to symbolic speech, *i.e.*, activity which is primarily conduct but has an expressive dimension, Congress lacks power to regulate it unless, *inter alia*, "the governmental interest is unrelated to the suppression of free expression;" *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). *Accord, Members of the City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).[5]

Under these decisions any content-based regulation of pure or symbolic speech in public forums violates the First Amendment. There may be some "narrow exceptions to the general prohibitions against subject-matter distinctions." *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 539 (1980). *See Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983) (for state to enforce a content-based exclusion it must show that its regulation is "necessary to serve a compelling state interest" and narrowly drawn to that end). These narrow exceptions rest on the "special interests of a government in overseeing the use of its property." *Consolidated Edison, supra*, 447 U.S. at 540. To meet them the government must sustain a very heavy burden because content-based restrictions on expression are subject to "the most exacting scrutiny." *Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981). So far as we can tell, the Court never has upheld a content-based law applicable to political speech on public sidewalks traditionally open for debate. Nor should it, since such speech is entitled to maximum First Amendment protection.

[5] The first clause cannot meet this test because its purpose is the suppression of free expression. Senator Pittman, the Chairman of the Senate Committee on Foreign Relations who sponsored the amendment which became § 1115, stated that his proposal would prohibit demonstrations by people who do not engage in any loud or boisterous conduct, or other disorderly conduct, but are walking up and down in front of an embassy with banners "on which is contained language bringing into odium and disrepute" certain governments and rulers. 81 Cong. Rec. 8588 (1937). He gave this as an example of what his proposal was designed to outlaw:

> "They want to show that a certain ruler is a murderer. How are they going to show it unless they have something on their banners and placards to indicate their sentiments and views? Otherwise they do not accomplish what they desire" (*id.*).

Senator Pittman made clear his proposal was designed to apply to demonstrations of only five or six people who were not interfering with traffic, but who "carried placards which were critical of the governments represented by the embassies." *Id.* at 8592.

Other Senators concurred. Senator Schwellenbach stated that nobody has "a constitutional right to go out with some wisecracking placard and insult foreign governments." *Id.* at 8591. Senator Barkley felt it was going a long way to allow American citizens to march in front of a foreign embassy "expressing their opinion of what is going on in the foreign country." *Id.* at 8592. He doubted whether close to an embassy "we ought to allow Americans to take sides with the different factions [in foreign governments] in such a way as to show their favoritism or partiality toward one faction or another". *Id.* at 8592-8593.

3. Even if there is room for some argument over whether the First Amendment ever tolerates content-based distinctions in public forums, there is no room for such argument when it comes to viewpoint discriminatory laws. The First Amendment never allows the government to discriminate based upon viewpoint. The Court reiterated this principle in *Taxpayers for Vincent, supra*, 466 U.S. at 804:

> "As *Stromberg* [v. *California*, 283 U.S. 359 (1931)] and *Lovell* [v. *Griffin*, 303 U.S. 444 (1938)] demonstrate, there are some purported interests—such as a desire to . . . exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate that they would immediately invalidate the rule. The general principle that has emerged from this line of cases is that the First Amendment forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others."

Accord, e.g., Perry Education Assn. v. *Perry Local Educators' Assn.*, 460 U.S. 37, 55 (1983) (state "may not pick and choose" between different views); *Cohen* v. *California*, 403 U.S. 15, 18 (1971) (state cannot punish "for the underlying content of the message . . . "). Because the government has a "paramount obligation of neutrality," *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion):

> "[I]ts regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communication" (*id.* at 67-68).

So strong is the viewpoint neutrality requirement that it applies not only to all public forums but nonpublic forums as well. Even in a nonpublic forum:

> "[T]he Government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius* v. *NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 783, ——, 105 S. Ct. 3439, 3451 (1985).

See Perry Education Assn., supra, 460 U.S. at 49. *Compare* App. 35-38a.

The majority argued (App. 49a, 51a-52a) that viewpoint discriminatory statutes may be preferable to neutral ones because the former restrict less speech than the latter. That view reads the viewpoint neutrality requirement-out of First Amendment jurisprudence. Admittedly, a law barring all free speech in the District of Columbia would contain a broader prohibition than a law barring only speech critical of foreign governments. That hardly justifies the latter statute. *Both* statutes are invalid, the first because it prohibits all speech, and the second because it allows the government to censor speech.

B. The First Clause Violates Other First Amendment Requirements.

1. *The Statute Prohibits Only Speech And No Dangerous Conduct.*

a. Following its earlier decision in *Zaimi* v. *United States*, 476 F.2d 511, 517 n. 41, 527 (D.C. Cir. 1973), the Court of Appeals held that the first clause "applies *only* to demonstrations in which signs are displayed that are designed to bring a foreign government into 'public odium' or 'public disrepute' " (App. 35a; emphasis added).[6] Respondents did not dispute this construction below or cross-petition to challenge this interpretation of the statute, and it is binding here. *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 798 n. 14 (1984).

Thus the first clause applies only when there is the "display" of a sign or similar device, and only when the "display" is "designed or adapted" to bring foreign governments into "public odium" or "public disrepute". It therefore makes the display of a sign criminal solely because of the speech inscribed on or the idea communicated by the sign. On the other hand, it does *not* prohibit any violence or dangerous conduct. It does not prohibit any violent demonstrations with or without the use of signs. It does not prohibit any conduct which threatens, assaults, intimidates or obstructs foreign officials, or injures their property. Much less does it prohibit individuals armed with baseball bats or machine guns from attacking foreign persons or foreign buildings. Since the first clause prohibits only the "display" of signs and no violent or dangerous conduct, it does not protect the security of foreign persons or buildings and cannot be defended on that ground.[7]

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[6] The construction of § 1115 followed in *Zaimi* is set forth in full in the Addendum to this Brief.

[7] In the end, even the majority agreed that "prohibiting a lone protester from carrying a sign of any sort bears no relation to safeguarding the physical security of the building and its occupants" (App. 33a).

b. A valid regulation of expression in public places must be, among other things, "narrowly tailored to serve a significant government interest. . . ." *Perry Education Assn.*, *supra*, 460 U.S. at 45. Precision of regulation is required even when less protected commercial speech implicates First Amendment rights:

> "[T]he First Amendment mandates that speech restrictions be 'narrowly drawn.' *In re Primus*, 436 U.S. 412, 438 (1978). The regulatory technique may extended only as far as the interest it serves." *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 565 (1980) (footnote omitted).

A law is unconstitutional on its face if it "does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech . . . ." *Thornhill* v. *Alabama*, 310 U.S. 88, 97 (1940). *See* cases cited in *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612-613 (1973). *See, e.g., Taxpayers for Vincent*, *supra*, 466 U.S. at 796-799:

> Unless the government has a valid interest in preventing peaceful insults to foreign officials which overrides First Amendment rights—a question we answer in Point II below—the first clause violates the First Amendment both as applied to Petitioners and on its face. It prohibits all speech and expression displayed by any person on signs or flags bringing foreign governments into "odium" or "disrepute" anywhere within 500 feet of their buildings.[8] *Compare* App. 48a. n. 18. It therefore casts a

[8] It blankets all signs displayed to bring into public odium "any foreign government, party, or organization, or any officer . . . thereof" or bring into public disrepute either "political, social, or economic acts, views, or purposes of any foreign government, party, or organization" or "any officer . . . or diplomatic or consular representatives of any foreign government." D.C. Code § 22-1115. It applies within 500 feet of "*any* building . . . used or occupied by *any* foreign government . . . ." D.C. Code § 22-1115 (emphasis added). Thus the statute on its face prohibits the display of a pro-Iraq sign in front of the Embassy of Iraq if it is designed to bring Iran into disrepute, even though Iran apparently has no official buildings in the District.

> broad blanket over large quantities of free expression protected by the First Amendment.[9] Further, while the first clause prohibits the "display" of all such signs or flags, it prohibits nothing else. The first clause therefore does not have any "plainly legitimate sweep," *Broadrick*, *supra*, 413 U.S. at 615. It has no legitimate sweep.[10] Because the first clause prohibits only constitutionally protected political speech, and prohibits no dangerous conduct of the kind which the government legitimately may outlaw, it is overbroad in *all* applications.

c. The correctness of this conclusion is confirmed by an analysis of 18 U.S.C. §§ 112(b)(1)-(2), a nationwide federal statute passed to protect the security and dignity of foreigners. Sections 112(b)(1)-(2) do *not* prohibit persons from peacefully displaying signs odious to foreigners either on the sidewalk directly in front of official foreign buildings or anywhere else. They only proscribe conduct which "intimidates, coerces, threatens, or harasses a foreign official . . . or obstructs [him] in the performance of his duties . . . ." 18 U.S.C. § 112(b)(1).

[9] The first clause does not give the police power to issue permits to demonstrate. *Frend*, *supra*, held the police could not issue a permit to conduct a demonstration otherwise prohibited by the first clause. 100 F.2d at 693-694. That interpretation controls here. *See*, *infra*, p. 40, n.24.

[10] Beside prohibiting the display of odious banners, the first clause makes it illegal to "display any flag, banner, placard, or device designed or adapted" to "intimidate, coerce" or harass any foreign official. *See* Addendum, *infra*. This inscrutable syntax makes it impossible to understand how the display of a device like a flag or banner could be designed or adapted to coerce or intimidate someone. The majority agreed that the first clause applies only when signs are displayed to create "public odium" or "public disrepute" (App. 35a).

In *CISPES (Committee in Solidarity)* v. *FBI*, 770 F.2d 468 (5th Cir. 1985), the Fifth Circuit upheld the statute as a permissible effort to proscribe terrorist acts against foreign officials, but made clear that the federal statute did not, and constitutionally could not, prohibit peaceful picketing or congregating directly in front of foreign embassies. *Id.* at 473-474, 477-478. In stark contrast to § 1115, the federal statute outlaws conduct which can and should be banned without prohibiting peaceful demonstrations. Given the federal statute which is not facially overbroad, Respondents cannot show that § 1115 is narrowly tailored to meet any legitimate interest.

2. *The Statute Severely Limits Free Speech.*

The First Amendment also requires that restrictions of public forum speech "leave open ample alternative channels for communication of the information." *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). As explained in *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 76 (1976) (Powell J., concurring):

> "The primary concern of the free speech guarantee is that there be full opportunity for expression in all of its varied forms to convey a desired message."

Petitioners are individuals of no great means. They are not supported by political action committees, and cannot afford to buy radio or television time or pay for newspaper ads. Their ability to communicate depends largely upon effective picketing—a unique mode of communication. The anti-picketing provisions of § 1115 apply everywhere within 500 feet of the perimeter of any official foreign building (including airline ticket offices). This 500 foot distance is not an abstract number. It is almost two football fields. If Petitioner Waller is allowed to protest against the backdrop of the Nicaraguan Embassy, his message will be conveyed effectively and likely will attract attention. But if he is relegated to holding his "STOP THE KILLING" sign in front of a Burger King

restaurant some 500 feet away, he may be perceived as either a vegetarian or an eccentric; and the effectiveness of his message will be severely impaired. The first clause was passed for the very purpose of minimizing effective picketing,[11] and has succeeded in accomplishing that objective.

In today's real world of media-dominated political debate, effective picketing requires attracting media attention. That in turn requires the creation of visual images which help media ratings and newspaper circulation. There is a good reason why protests against the military or the President often occur near the Pentagon or the White House: the media covers them. Such protests at other locations receive less coverage. The first clause imposes not a trifling limitation upon speech, *compare* App. 26a, 24a, but a significant limitation on all hostile picketing against foreign governments everywhere in the nation's capital. It leaves open less adequate alternative channels of communication than other laws found troublesome by the Court. *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85 (1977) ("For Sale" signs); and *Martin* v. *Struthers*, 319 U.S. 141, 146 (1943) (door to door distribution of circulars).

3. *The Statute Is Vague.*

a. A law violates due process if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application". *Connally* v. *General Const. Co.*, 269 U.S. 385, 391 (1926). The void for vagueness doctrine "demands a greater degree of specificity" in the context of the First Amendment

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[11] During the 1937 debates Senator Pittman stated:

> "The very object of the picketing is to do that. The telegrams all indicate that the desire is to bring into odium the government whose embassy or legation is being picketed. Otherwise, the picketers do not accomplish anything." 81 Cong. Rec. 8589 (1937).

See, supra, p. 10, n.5.

than in other areas. *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974). *See Grayned* v. *Rockford*, 408 U.S. 104, 108-109 (1972).

The statute is vague as applied to Petitioners. It makes Petitioner Brooker subject to prosecution if she stands in front of the Soviet Embassy and displays the American flag. What do Respondents see in the American flag which makes it "designed or adapted" to bring the Soviet Union into "public disrepute"? [12] If Petitioner Waller stands in front of the Nicaraguan Embassy with his "STOP THE KILLING" sign, the police cannot tell merely from looking at the sign displayed whether he opposes killing by the contras, or the Nicaraguan government, or both or neither. Nor can one tell whether a "SOLIDARITY" sign is designed only to support the Polish labor movement or also oppose the Soviet Union. Respondents now have installed, pursuant to the mandate of Congress, permanent Sakharov Plaza signs directly in front of the Soviet Embassy; and Gorbachev has released Sakharov. Do Petitioners commit a crime if they display a "THANK GOD SAKHAROV IS RELEASED" sign next to the "Sakharov Plaza" signs Respondents have installed?

Petitioners are interested in *criticizing* foreign governments (J.A. 4, 7, 10). Because the statutory terms "public odium" and "public disrepute" are nowhere narrowed or defined, and no standards for their application are prescribed, it remains a mystery whether they cover mere criticism, or only the sharpest criticism. And if Respondents enforce this statute to prohibit all signs or flags which display mere criticism of a foreign government—as they have routinely in the past—that serves to dramatize the statute's sweeping overbreadth.

b. Petitioners can challenge the vagueness of this statute on its face because it "reaches 'a substantial

[12] By contrast, Respondents would have to concede that people have a constitutional right to display the red flag on the White House sidewalk. *Stromberg* v. *California*, 283 U.S. 359 (1931).

amount of constitutionally protected conduct' ", *Kolender* v. *Lawson*, 461 U.S. 352, 359 n. 8 (1983), *quoting*, *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982); and imposes criminal penalties on political speech.

Section 1115 is vague on its face because the operative terms "public odium" and "public disrepute" are inherently vague. The Court has invalidated several laws no more vague than this one. *Kolender*, *supra*, 461 U.S. at 358-362 ("credible and reliable" identification); *Smith* v. *Goguen*, 415 U.S. 566, 572-574 (1974) (treats flag "contemptuously"); and *Coates* v. *Cincinnati*, 402 U.S. 611, 614 (1971) ("annoying" conduct).

No signposts are visible in this fog. There is therefore no way the policeman on the beat can enforce this statute properly. All that can be said with confidence on this subject is that Respondents have made clear their intention to arrest Petitioners and many others if they display their proposed signs or the American flag.

c. The most important of the several evils from which vague laws suffer is that they are overly susceptible to arbitrary and discriminatory law enforcement. *Kolender*, *supra*, 461 U.S. at 358. Here arbitrary and discriminatory law enforcement is not a potential danger, but an existing fact. At the South African Embassy, Respondents have accommodated thousands of demonstrators by waiting to arrest them until after the media arrives to cover the event, and not one of those protesters has been prosecuted (App. 50a n. 21). Respondents have explained they endorse the political viewpoint of these protesters: it " 'would be untenable . . . to prosecute . . . individuals who demonstrated peaceably to call attention to the gross injustices . . . of apartheid.' " (J.A. 34). Respondents admit that "no significant District of Columbia interest would be served by" prosecuting even those South African protesters who cross police barricades (*id.* at 35).

But in this case the District asserts a compelling interest in prosecuting peaceful demonstrators who protest against Nicaragua or the Soviet Union. While Petitioners cannot demonstrate against Nicaragua within 500 feet of its Embassy, Respondents have allowed demonstrators to picket against the contras.[13] Conservatives or Jews who demonstrate within 500 feet of Sakharov Plaza are promptly arrested and prosecuted under § 1115.[14]

C. The Contrary Reasoning Of The Courts Below Is Unsound.

1. In rejecting Petitioners' First Amendment claims, the District Court stated (App. 109a):

> "Demonstrations in opposition to the policies of a foreign government are obviously more likely to result in violence against foreign personnel or property than demonstrations in support of a foreign government."

This view is fundamentally hostile to the First Amendment, and all it stands for. It would discriminate in favor of officially welcome viewpoints and against criticism, and would mean that, because peaceful demonstrations could theoretically become violent, peaceful free speech should be banned.[15]

2. Contrary to the view of the Court of Appeals (App. 23a), *Adderly* v. *Florida*, 385 U.S. 39 (1966) (demonstrations on jail grounds) and *Greer* v. *Spock*, 424 U.S. 828 (1976) (political events at military bases) are inapposite. This is a public forum case and those were not. *Cox* v. *Louisiana*, 379 U.S. 559 (1965), is a public forum case; it involved a statute which prohibited picketing or parading near a courthouse with the intent to interfere with, obstruct, or impede the administration of justice. *See also* 18 U.S.C. § 1507. That such a statute might well withstand constitutional scrutiny is of little assistance to Respondents here.

[13] In April 1987, Respondents allowed about 75 demonstrators with "odious" signs to demonstrate on the sidewalk in front of an agency that represents the contras. The Washington Post, April 30, 1987, at A42.

[14] *See* pp. 3-4, n.3, *supra*.

[15] *See, e.g., Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 100-101 (1972):

> "Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter."

First, the statute involved in *Cox* prohibited potentially unlawful conduct, not pure speech.[16] State and Federal governments undoubtedly have a legitimate interest in insulating the courts from mob rule. The statute in this case, by contrast, prohibits speech and not dangerous conduct. Second, the statute involved in *Cox* was viewpoint neutral; the first clause of § 1115 is not. *Compare* 18 U.S.C. § 112. Finally, *Cox* involved the judicial branch of government, not the political branches. The judicial branch may have an interest in avoiding not only the influence of politics, but also the *appearance* of such an influence. *See United States* v. *Grace*, 461 U.S. 171, 183 (1983). Even that interest is not sufficient to keep peaceful picketers from demonstrating on the public sidewalks in front of this Court. *Id.* But political institutions cannot have an interest in avoiding the appearance that their political results are arrived at by a political process. Since the foreign governments who open embassies here do so for the very purpose of engaging in international diplomacy and international politics—and sometimes espionage—they expose themselves to political free speech on the public streets and sidewalks which have traditionally hosted that function.

[16] "We are not concerned here with such a pure form of expression as newspaper comment or a telegram by a citizen to a public official. We deal in this case not with free speech alone, but with expression mixed with particular conduct" (379 U.S. at 564).

The majority's suggestion (App. 16a-17a) that this case presents a "political question" beyond the institutional capability of Article III courts to decide is farfetched. *See Goldwater* v. *Carter*, 444 U.S. 996, 998-1001 (1979). The issue here is whether the First Amendment protects picketing against foreign governments on the sidewalks of the nation's capital. The Court is capable of deciding it. *E.g.*, *Schacht* v. *United States*, 398 U.S. 58 (1970) (demonstrations against war effort); *Reid* v. *Covert*, 354 U.S. 1 (1957) (Bill of Rights constrains treaty power); and *Jeannette Rankin Brigade* v. *Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C.), *aff'd*, 409 U.S. 972 (1972) (demonstrations on Capitol grounds).

3. Section 1115 was passed by a Congress which believed that suppressing certain political speech here at home would have desirable consequences elsewhere. Senator Pittman argued that by preventing insulting demonstrations against Ambassadors here, we would avoid arousing the hatred of foreign people, and thus protect the safety of Americans abroad from injury by possible hostile mobs. 81 Cong. Rec. 8587 (1937). Four years before Pearl Harbor he explained:

> "The sentiment of the Japanese and Chinese at this time is one of friendliness and respect for our people, which is the greatest protection they can possibly have" (*id.* at 8590).

The majority accepted a First Amendment exception for peaceful but insulting speech. The dissent disagreed, but was willing to accept a First Amendment exception for peaceful but dangerous speech. Based upon the government's interest in enhancing the safety of Americans abroad, the dissent was willing to sustain a law which would have prohibited all demonstrations within 500 feet of all foreign buildings in the District (App. 93a-94a and n.23), and indicated it might accept even greater limits on free expression if the government could come up with more satisfactory proof of its dangerous consequences (App. 77a-81a). That position—at bottom that the government can ban peaceful political speech because the ideas conveyed might have dangerous or offensive consequences—cannot be reconciled with the First Amendment.

The government *never* can ban peaceful political speech because it may have dangerous political consequences. Even the advocacy of violence or lawlessness is protected by the First Amendment. As the Court unanimously concluded in *Brandenburg* v. *Ohio*, 395 U.S. 444, 447-448 (1969):

> ". . . the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

Schacht v. *United States*, 398 U.S. 58 (1970), involved criticism of the armed forces while we were engaged in combat overseas. The Court unanimously held (*id.* at 63):

> "The final clause of § 772(f), which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment."

Thus, not even the War Power, which is perhaps the greatest power of all, allows Congress to punish offensive speech while permitting speech supporting the government. *See Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441 (1974) (voiding loyalty oath preventing communists from running for office). *See also New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (grave and irreparable damage to national security not sufficient for prior restraint).

The potential harm alleged in this case is far more remote than it was in those cited above. Criticism of the military while we were fighting a war in Vietnam un-

doubtedly harmed the war effort, encouraged the enemy to persevere, and thus jeopardized the lives of soldiers in combat. *Brandenburg* involved a speech advocating the use of force and violation of law by a member of the Ku Klux Klan; it was provocative, potentially "dangerous", and odious by any civilized standard. Demonstrations against the President, particularly on vital issues such as war and peace or arms control, can have a significant impact upon our national objectives. The President's ability to deal effectively with other leaders around the world depends upon the support of his constituents at home. These are some examples of protected free speech which has serious negative consequences. Given the chance, in each of these cases the government could have produced credible affidavits describing in lurid detail the evil effects likely to result from allowing all of this speech. But in all of these cases the possible danger which might result from the political expression does not deprive it of First Amendment protection.

In the end, the decision whether undesirable speech should or should not be allowed has been made by the First Amendment itself. It allows all political speech in public forums which is peaceful—even speech advocating the overthrow of the government. If the government is allowed to prohibit political speech because it is insulting or dangerous, that will produce results far worse than those occasioned by the "clear and present danger" test unanimously laid to rest in *Brandenburg*.

II. THE ARTICLE I POWER TO PUNISH OFFENSES AGAINST THE LAW OF NATIONS DOES NOT ALLOW CONGRESS TO BAN PEACEFUL SPEECH INSULTING TO FOREIGN NATIONS.

A. The First Amendment Applies To The Power To Punish International Offenses Like All Other Powers.

"The nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief

Executive . . .", *Watts* v. *United States*, 394 U.S. 705, 707 (1969), and also members of the legislative and judicial branches. Yet the First Amendment allows protesters to peacefully display picket signs on the public sidewalks in front of the official buildings of each of the three branches. *E.g.*, *United States* v. *Grace*, 461 U.S. U.S. 171 (1983) and *Jeannette Rankin Brigade* v. *Chief of Capitol Police*, 342 F.Supp. 575 (D.D.C.), *aff'd*, 409 U.S. 972 (1972). The First Amendment prohibits Congress from curtailing speech because it "invites dispute, creates dissatisfaction with conditions the way they are, or even stirs people to anger." *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 64 (1976) (plurality opinion).[17] The majority discovered in the power to punish offenses against the Law of Nations an exception to this free speech principle, and the authority—conferred nowhere else in Article I—to punish insulting or annoying political speech. That conclusion was quite wrong.

The First Amendment's protection of political insults applies when the government exercises its domestic powers, including the police power. The power to regulate foreign affairs is no different. In *Perez* v. *Brownell*, 356 U.S. 44, 58 (1958), the Court stated:

> "The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations."

Accord, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (President's power in interna-

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[17] Free speech may "best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminello* v. *Chicago*, 337 U.S. 1, 4 (1949). Resorts to "exaggeration, [and] to vilification . . . are, in the long view, essential to enlightened opinion . . . ." *Cantwell* v. *Connecticut*, 310 U.S. 296, 310 (1940). "[D]ebate on public issues should be uninhibited, robust, and wide-open . . . ." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

tional relations, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution"). *See Schacht*, *supra*, 398 U.S. at 58, 63 (War Power does not allow punishing offensive speech while allowing acceptable speech).

In *Reid* v. *Covert*, 354 U.S. 1, 16 (1957), the Court rejected a governmental argument that incursions upon Bill of Rights protections could be justified as necessary and proper to carry out the government's obligations under international agreements:

> "The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress . . . which is free from the restraints of the Constitution."

Reid held that the full panoply of Fifth and Sixth Amendment rights was available to Americans tried overseas by military courts, notwithstanding any contrary treaties which are, under Article VI, the "supreme Law of the Land" (*id.* at 18-19). *Accord*, *Kinsella* v. *United States*, 361 U.S. 234 (1960). *See also De Geofroy* v. *Riggs*, 133 U.S. 258, 267 (1890) ("It would not be contended that [the treaty power] extends so far as to authorize what the constitution forbids"). If the Bill of Rights applies with full force to treaties signed by the President and ratified by Congress, it applies with equal force to statutes passed to implement other far more amorphous provisions of customary or non-customary international law.

B. The Original Intent Of The Framers Confirms This Conclusion.

The First Amendment provides that "Congress shall make *no* law . . . abridging the freedom of speech . . ." (emphasis added). Article I, § 8, cl. 10 gives Congress power to define and punish "Offenses against the Law of Nations". Nowhere does the language of this Article I power suggest that it could be exercised in a way which

violates the First Amendment's explicit and unequivocal command.

The Court's readings of original intent are in accord. "The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential . . . ." *Martin* v. *Struthers*, 319 U.S. 141, 143 (1943). The "forefathers did not trust any government to separate the true from the false for us." *Thomas* v. *Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

In *Reid*, *supra*, the Court found nothing "in the debates which accompanied the drafting and ratification of the Constitution which even suggests" that Congress could exercise that treaty power in a way which violates the Bill of Rights. 354 U.S. at 16.

> "It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions" (*id.* at 17).

The majority opinion cites evidence (App. 11a-12a) that the framers intended Congress would have power to punish offenses against international law. That proposition is self-evident from the text of Article I itself. But the majority cited no evidence that the framers intended that that power could be exercised by passing laws which abridge the freedom of speech or of the press. The framers also may have understood that acts such as tearing down a minister's flag, rioting, or publishing actionable libel (App. 10a-11a) were against the law in the eighteenth century. Those acts are equally beyond the protection of the First Amendment today. Peaceful political speech was not then and is not now. The free-

wheeling approach of the Court below in arriving at a contrary conclusion rests upon notions of proper "polity" (App. 23a) instead of actual evidence of original intent.

One document fresh in the minds of the framers and ratifiers was the Declaration of Independence. It accuses King George of having "obstructed the Administration of Justice," of having "plundered our seas" and "burned our towns," and of being "a Tyrant." Declaration of Independence, reproduced in U.S.C.A., Constitution, Volume I, pp. 3-4. It further accuses him of sending foreign mercenaries to finish:

> "the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation" (*id.* at 4).

If the decision below is correct, the framers must have intended that, while the people would be free to vilify George Washington, they could be jailed for displaying the Declaration of Independence within 500 feet of the doorstep of the representatives of King George.

C. Congress Has Concluded That The Power To Punish International Offenses Does Not Allow It To Ban Insulting Speech.

In 1961 the United States signed the Vienna Convention on Diplomatic Relations. Article 22.2 provides:

> "The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity." 23 U.S.T. 3227, T.I.A.S. No. 7502.[18]

[18] By affirming that "the rules of customary international law should continue to govern questions not expressly regulated by [its] provisions", 23 U.S.T. 3230, T.I.A.S. No. 7502, the Convention preempts customary international law in all areas it covers.

In 1972, Congress implemented the Vienna Convention by amending 18 U.S.C. § 112. Act for Protection of Foreign Official Guests of the United States, Pub. L. No. 92-539, Title III, § 301, 86 Stat. 1072, 1073 (1972) (codified as amended at 18 U.S.C. § 112(b) (1973)). As originally enacted, § 112(b) prohibited willful acts or attempts "to intimidate, coerce, threaten or harass . . . or obstruct a foreign official . . . ." Section 112(c)(1), punished anyone who:

> "parades, pickets, displays any flag, banner, sign, placards, or device, or utters any word, phrase, sound, or noise, for the purpose of intimidating, coercing, threatening, or harassing any foreign official or obstructing him in the performance of his duties . . . ."

When the Senate considered the House-passed amendments, it added a Section 112(e) which provides:

> "Nothing contained in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the first amendment to the Constitution of the United States."

The Senate added subsection (e) to express its deep concern to judicial and executive officials "to use all due care to see that legitimate expression and assembly has not been abridged" and that the role of First Amendment rights "is not diminished." S. Rep. No. 1105, 92d Cong., 2d Sess. 19 (1972). Subsection (e) became law. Pub. L. No. 92-539, Title III, § 301, 86 Stat. 1072, 1073 (1972).

The anti-picketing provision of the 1972 Act did not prohibit peaceful picketing—only picketing and similar activity undertaken for the purpose of "intimidating, coercing, threatening or harassing" any foreign official. Nor did it prohibit the display of insulting signs. In 1976, Congress again amended § 112, this time to repeal the anti-picketing provision passed in 1972. Pub. L. No. 94-467, § 5, 90 Stat. 1999 (1976). Left standing was the

prohibition on willful acts or attempts to "intimidate, coerce, threaten," etc. of § 112(b). Congress explained the repeal this way:

> "This language raises serious Constitutional questions because it appears to include within its purview conduct and speech protected by the First Amendment." H.R. Rep. No. 1614, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. Code Cong. & Ad. News 4480, 4484 n.9; S. Rep. No. 1273, 94th Cong., 2d Sess. 8 n.9 (1976); *see also* 122 Cong. Rec. 31580 (Sept. 21, 1976) (statement of Rep. Hungate).

Thus under the nationwide federal statute Petitioners' demonstrations with annoying signs are deemed not prohibited, but protected by the First Amendment. The federal statute applies everywhere in the 50 states, including New York City, where the United Nations with its high concentration of related foreign buildings is located.

Three conclusions follow. First, Congress has determined that its power under Art. I, § 8, cl. 10 is subject to First Amendment requirements. *Compare* App. 18a. Second, Congress has determined that it cannot exercise that Article I power to ban peaceful demonstrations which insult or annoy foreign officials because the First Amendment protects them.[19] Third, Congress has determined that neither the Vienna Convention of 1961—which required us to take "all appropriate steps" to assure the mission's "peace" and "dignity"—nor any other provision of international law requires or allows the United States to ban peaceful demonstrations which insult foreign officials or governments.[20] As we now explain, the correctness of this last conclusion is confirmed by the requirements and limitations of international law itself.

[19] The purpose of the 1972 amendments to § 112 was "to protect the peace, dignity and security of foreign officials" in their official buildings and residences. S. Rep. No. 1105, *supra*, at p. 19.

[20] After the 1972 amendments to § 112, President Nixon issued a proclamation agreeing to the 1961 Vienna Convention on behalf of the United States. 23 U.S.T. 3227, T.I.A.S. No. 7502. After the 1976 amendments to § 112, President Carter issued a proclamation agreeing to the international agreements implemented by Pub. L. No. 94-467, *supra*. 28 U.S.T. 1975, T.I.A.S. No. 8532.

The majority may have misunderstood the facts when it stated that § 1115 was a statute "which both Congress and successive Presidents have declared to be necessary to fulfill our obligations under both customary international law and a treaty which we have signed" (App. 18a). The only relevant treaty is the 1961 Vienna Convention. It would have taken keen foresight for the Congress legislating in 1938 to have implemented its provisions. And if any Presidents have made any declarations about § 1115, they were not cited by the majority and we are unable to find them.

D. International Law Does Not Require The United States To Protect Foreign Officials From Peaceful Political Insults.

1. Section 117 of the *Restatement (Second) of the Law, Foreign Relations Law* (1965 ed.) states:

> "(1) The United States has the power under the Constitution to make an international agreement if
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> • • • •
>
> "(b) the agreement does not contravene any of the limitations of the Constitution applicable to all powers of the United States."

Comment d to § 117 states:

> "Such limitations as those contained in the Bill of Rights apply to action taken under the grant of the power to make international agreements just as to action taken under other grants of governmental power."

There is therefore an explicit recognition in international law that the United States government is powerless to make agreements which abridge the First Amendment right of free speech.

The majority jumped from the fact that customary international law has recognized an obligation to avoid "[i]nfringement of the rights of embassadors," 4 W. Blackstone, Commentaries 68, 72 (1854), *quoted in Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 815 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 469 U.S. 811 (1985), to the unsupportable conclusion that such "rights" include the ones at issue here. There are several flaws in that analysis even beyond those discussed. International law does not purport to override national constitutions securing individual freedoms; obligations under customary international law are recognized only on a showing of "the general assent of civilized nations" as to the matter at issue, *The Paquete Habana*, 175 U.S. 677, 694 (1900); and *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980), which is lacking here; and public officials in our country and other civilized ones regularly deliver the kinds of insults from which the Court below thought foreign officials should be insulated.

2. International law is, by definition, those legal rules applicable to a nation "that cannot be modified unilaterally by it." *Restatement*, *supra*, § 1. Treaties or other international agreements apply expressly to all nations which enter into them. Customary international law is a body of fundamental legal principles which all civilized nations recognize. Respondents have failed to sustain their burden of showing that there is a single statute like § 1115 anywhere else in the world. As there is no proof that any other country has or enforces a similar law, the United States cannot be obligated by international law to pass or enforce § 1115. *See The Paquete Habana*, *supra*; *Filartiga*, *supra*.

To the contrary, the Record shows that the Soviet Union allows insulting protests with insulting banners on the sidewalk directly in front of our Embassy in Mossow (J.A. 31-33) which are "officially organized" (J.A.

32) by the Soviet government. State sponsored insults undoubtedly are more internationally offensive than insults by private citizens over whom the government has limited control. Respondents have cited no provision of international law supporting the unique proposition that, while the Kremlin may orchestrate state sponsored insults right in front of our Embassy in Moscow, the United States has a non-reciprocal duty to keep its private citizens outside of a 500 foot insult-free zone around the Soviet Embassy here.[21] *See* J.A. 22 (Great Britain allows demonstrations in London). *See also* The Washington Post, March, 1987, at D4, col. 1 (demonstrations against United States conducted on sidewalks in front of American Embassy in Dublin, Ireland, continued for one year).

3. In general the protection of ambassadors, in the few judicial decisions speaking to it, seems to have extended only to outright physical assaults or personal indignities akin to assaults, as the seizing of an ambassador's cane. *See Republica* v. *De Longchamps*, 1 Dall. 111 (Pa. Oyer and Terminer) (1784); *Tel-Oren*, *supra*, 726 F.2d at 815 (ambassador "somewhat roughed up"); *Von Dardel* v. *Union of Soviet Socialist Republics*, 623 F. Supp. 246, 257 (D.D.C. 1985) (diplomat allegedly arrested and held incommunicado).

The Courts have been reluctant to find a consensus giving rise to obligations under customary international law even on such subjects as the right to emigrate, *Frolova* v. *Union of Soviet Socialist Republics*, 588 F. Supp. 358 (N.D. Ill. 1983), *aff'd*, 731 F.2d 370 (7th Cir. 1985), and a nation's torture of its own citizens, *Tel-*

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[21] Reciprocity is also a significant thread in the fabric of international law. "At the very core of the processes by which customary international law develops are reciprocal claims and tolerances among nations." Steiner and Vagts, *Transnational Legal Problems* (1968), p. 506. *See also Hilton* v. *Guyot*, 159 U.S. 113 (1895); *compare Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 411 (1964).

Oren, *supra*, 726 F.2d at 813; *compare Filartiga*, *supra*. Since the District of Columbia apparently is the only city in the world to enforce the 500 foot insult-free zone mandated by § 1115, there is no international consensus on the nuances of "insulting speech" implicated in this case.

E. An Insult Free Interest Is Unrealistic And Unworkable.

1. There is no close correlation between the 500 foot zones created by § 1115 and the interest in shielding foreign officials and governments from insults which they are supposed to further. Nothing about insults makes them inherently less offensive when they are expressed outside the zones. Protests against foreigners on the White House sidewalk when they visit the President, or near the Capitol when they visit a member of Congress, or whenever else they may be found outside the zones, can be as insulting as those occurring within 500 feet of an embassy. Deliberately insulting statements by officials of the executive and legislative branches freely uttered everywhere outside the zones, particularly if widely reported by the media, can be more annoying than the signs of a few demonstrators. Nor does the first clause of the statute deal effectively with insults within the 500 foot zones. Insulting remarks by public and private officials are beamed to television and radio sets, and regularly appear in newspaper headlines, throughout the zones. Further, the first clause does not prohibit individual demonstrators from shouting oral hostilities to the ambassador near his doorstep. *Zaimi* v. *United States*, 476 F.2d 511, 513 (D.C. Cir. 1973). If the insult free interest is legitimate, our allowance of any of these activities is not.

The Court of Appeals believed (App. 26a) that it would be "unthinkable" to silence public and press criticism of foreign officials outside the 500 foot zones. But if the avoidance of political insult is accepted as a legitimate interest (or requirement of international law),

there is simply no principled way to confine it to the 500 foot zones.

2. On June 17, 1982, President Reagan, in a speech to the United Nations General Assembly, accused the Soviets of "tyranny", "repression", "aggression and support for violence around the world", "violating" biological weapons agreements, "trying to manipulate the peace movement in the West", and supporting "guerrillas and terrorists". The New York Times, June 18, 1982, at A16, cols. 1-4. When the Russians shot down a domestic Korean airliner with hundreds of civilians aboard, President Reagan expressed " 'revulsion' " for " 'a horrifying act of violence' ", and members of Congress and other American officials erupted in a fury of outrage. *Id.*, Sept. 2, 1983, at 1, col. 6. Such deliberate insults by government officials—and especially those uttered in the sanctuary of the United Nations building—reach a worldwide audience. They are therefore far more "odious" than a few individuals standing on a street with picket signs. The President, Congress, and countless other American officials obviously view the desirability of protecting the "dignity" of foreign individuals and nations differently from the majority below.

3. The result below, if correct, requires the conclusion that Respondents are violating international law whenever they tolerate anti-apartheid or other demonstrations within the 500 foot zones. The implications for the federal government are more far-reaching. As detailed in the dissent (App. 63a-64a), the federal government has invoked the Constitution to fend off complaints about anti-Hitler demonstrations in the 1930s and 1940s; and cited 18 U.S.C. § 112 to explain that anti-Soviet demonstrations in 1979 were legal. In *CISPES (Committee in Solidarity)* v. *FBI*, 770 F.2d 468, 474, 477 (5th Cir. 1985), the federal government wisely conceded in the Fifth Circuit that the statute does not prohibit peaceful opposing demonstrations, even within one hundred

feet of foreign buildings. If the decision below is correct, the United States compromised a compelling interest, and violated international law, in all instances such as these—and continues to do so everywhere in the 50 states where 18 U.S.C. § 112 applies.

III. THE SECOND CLAUSE OF THE STATUTE, WHICH ALLOWS THE POLICE TO DISPERSE CONGREGATIONS, VIOLATES THE FIRST AMENDMENT, BOTH AS WRITTEN BY THE LEGISLATURE AND AS REWRITTEN BY THE COURT OF APPEALS.

A. The Second Clause Is Unconstitutional As Written.

"The First Amendment protects political association as well as political expression." *Buckley* v. *Valeo*, 424 U.S. 1, 15 (1976). The right to congregate is a component part of the "right of the people peaceably to assemble" guaranteed by the First Amendment. "Effective advocacy of . . . points of view, particularly controversial ones, is undeniably enhanced by group association," and there is a "close nexus between the freedoms of speech and assembly." *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958). "The Court has acknowledged the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues. . . ." *Citizens Against Rent Control* v. *Berkeley*, 454 U.S. 290, 295 (1981).

The second clause of § 1115 makes it a crime:

> ". . . to congregate within 500 feet of any such building or premises, and refuse to disperse after having been ordered so to do by the police authorities of the said District."

Far from being vague, the second clause of § 1115 is about as clear—and overbroad—as language can make it. It imposes no limitations whatsoever upon the dispersal

powers of the police. Under this statute, the police have the power to disperse for any reason anywhere within the 500 foot zones any group of three or more peaceful demonstrators with or without picket signs, people standing on the corner waiting for a bus, or reporters huddled in the newsroom of The Washington Post discussing a newspaper article (the rear of the Post building abuts the rear of the Soviet Embassy).

The second clause is therefore unconstitutional on its face. The Court has invalidated several laws which cabined official discretion more narrowly than this one. *E.g.*, *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 150-151 (1969) (permits denied when public welfare, peace, good order, etc., so require); *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983) (need to produce "credible and reliable" identification vests excessive discretion in police); *Coates* v. *Cincinnati*, 402 U.S. 611, 615-616 (1971) (ordinance prohibiting only "annoying" congregations violates associational rights); and *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974) (ban on treating flag "contemptuous[ly]" confers standardless discretion on police). *See, e.g.*, *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947, 964 n. 12 (1984); *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 628-632 (1980); and *Hynes* v. *Mayor and Council of Oradell*, 425 U.S. 610 (1976).

B. The Court Of Apeals Lacked Authority To Rewrite The Second Clause.

In *Zaimi* v. *United States*, 476 F.2d 511 (D.C. Cir. 1973), the Court of Appeals stated that the second clause "is functionally as well as grammatically separate from" the first, *id.* at 515; and "clearly" means what it says, *id.* at 527. The majority below instead concluded that the second clause permits the dispersal authority to be exercised "only when the police reasonably believe that a threat to the security or peace of the embassy is pres-

ent" (App. 43a). For several reasons the majority should not have "performed a remarkable job of plastic surgery upon the face of" the second clause. *Shuttlesworth, supra,* 394 U.S. at 153.

1. The District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, Title I, § 111, 84 Stat. 475, made the District of Columbia Court of Appeals the highest court of the District of Columbia. D.C. Code § 11-102 (1981). To interpret statutes applicable only in the District of Columbia, it has "jurisdiction equivalent to that exercised by state courts." *Palmore* v. *United States,* 411 U.S. 389, 392 n. 2 (1973). *See also Key* v. *Doyle,* 434 U.S. 59 (1977). Neither the District of Columbia Court of Appeals since the Court Reform Act, nor the United States Court of Appeals before then, has narrowed the second clause.

Federal courts "lack jurisdiction authoritatively to construe state legislation", (*United States* v. *Thirty-Seven (37) Photographs,* 302 U.S. 363, 369 (1971)); and they lack "power to . . . narrow state laws" (*Grayned* v. *Rockford,* 408 U.S. 104, 110 (1972)). When an "ordinance by its plain terms is not easily susceptible of a narrowing construction", *Erznoznik* v. *Jacksonville,* 422 U.S. 205, 216 (1975), federal courts do not engage in a "rewriting of the ordinance. . . ." *Id.* at 216 n. 15. *See also Kolender, supra,* 461 U.S. at 357-361.

Federal courts may themselves adopt a narrowing construction of a state statute only when one is reasonably and readily apparent. *Gooding* v. *Wilson,* 405 U.S. 518, 520-521 (1972). Only one arguably apparent narrowing construction suggests itself: that the second clause be limited to congregations of persons displaying the insulting signs prohibited by the first clause. But the majority agreed that the second clause is not "limited by the first" (App. 44a n. 17) and itself rejected that construction. Further that construction would make the

second clause unconstitutional for the same reasons that the first clause is.

2. The second clause as rewritten now duplicates other laws already on the books. As the majority noted (App. 41a-42a), the local disorderly conduct statute, D.C. Code § 22-1121(2), allows the police to disperse any congregation which might result in a breach of the peace. And Article IV, § 5a.(5) of the local Police Line Regulation, upheld in *Washington Mobilization Committee* v. *Cullinane,* 566 F.2d 107, 117-119 (D.C. Cir. 1977), allows the police to clear, and keep people out of, any area when they consider it necessary for "the protection of persons and property."[22] The second clause adds nothing to these other laws, and is therefore superfluous.

The majority's construction also produces a result which Congress rejected when it passed § 1115 in 1937. As detailed in *Zaimi, supra,* 476 F.2d at 519-521 and n. 59, when the proposal which became § 1115 was considered on the Senate floor, Senator La Follette offered a substitute. It would have added language to the local unlawful assembly statute, now D.C. Code § 22-1107, to make clear its application to unlawful assemblies around foreign buildings. 81 Cong. Rec. 8519 (1937), *quoted in Zaimi,* 476 F.2d at 519 n. 59.[23] The unlawful assembly statute makes it a crime, among other things, for people to congregate and assemble "and engage in . . . disorderly conduct," or even for a single individual to "engage in any disorderly conduct", D.C. Code § 22-1107—and the crime is complete even if no dispersal order is given or

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[22] Section 5a of the Police Line Regulation is reproduced in the opinion below. App. 42a n.16.

[23] The unlawful assembly statute was passed by Congress in 1892, 27 Stat. 323, ch. 320, § 6, and amended in 1898, 30 Stat. 723, ch. 638. The disorderly conduct statute described above in the text, D.C. Code § 22-1121, was enacted in 1953, 67 Stat. 98, ch. 159, § 211a.

disobeyed.[24] Congress voted down the La Follette substitute, 81 Cong. Rec. 8593 (1937). Instead it enacted the statute now codified as D.C. Code § 22-1115 with its unlimited power to disperse congregations. The majority has construed the second clause of § 1115 to give it a scope narrower than the La Follette substitute rejected in 1937.

3. Far from clarifying or rectifying anything, the majority's rewrite only adds confusion about the proper meaning and constitutionality of the second clause. Petitioners made as clear as possible that they had no desire to engage in any violence or untoward conduct (J.A. 5, 8, 11). Subject to the resolution of lingering vagueries in the majority's construction, *see, infra*, pp. 42-43 and n.26, it would seem that the second clause as rewritten would not prohibit Petitioners from congregating without signs. *See* J.A. 4-5, 8, 11. But the majority did *not* order the issuance of declaratory or injunctive relief prohibiting enforcement of the second clause except as narrowed.[25] *Compare* App. 53a-54a. Instead it dismissed Petitioners' challenge to the second clause (App. 40a-43a).

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[24] *Williams* v. *District of Columbia*, 419 F.2d 638, 646 (D.C. Cir. 1969) (*en banc*), imposed a narrowing construction on § 22-1107. *Williams* requires as an element of the offense that a breach of the peace be threatened by language which creates a substantial risk of provoking violence or constitutes a nuisance. *Williams* and all other District of Columbia Circuit decisions rendered before February 1, 1971, the effective date of the Court Reform Act of 1970, are the case law of the District of Columbia and binding on the District of Columbia Court of Appeals unless and until overturned by it *en banc*. *M.A.P.* v. *Ryan*, 285 A.2d 310, 312 (D.C. App. 1971).

[25] The Court of Appeals remanded for the narrow purpose of considering the issuance of declaratory relief with respect to two specific instances of non-prohibited conduct alleged in the complaint (App. 53a). As we read the majority opinion, the remand involves only the application of the first clause, and not the second. Had the remand directed declaratory relief against enforcement of the second clause except as narrowed, Respondents would have been required to dismiss several pending cases in which they had obtained convictions for conduct not covered by the narrowed interpretation of the second clause.

This leaves the police free to enforce the second clause exactly as written by the legislature, and in the past Respondents did just that.[26] Before and during this litigation Respondents arrested under the second clause scores of persons at the Soviet Embassy who displayed no signs and posed no danger of violence. In *Lipkin* v. *United States* (D.C. App. Nos. 86-190 to 86-198) nine individuals opposed to Soviet policy were convicted under the second clause; it was stipulated that they did not carry signs or shout, and did not harass or interfere with anyone at the Embassy. *Id.*; Trial Transcript, pp. 17-18. *After* the decision below, the United States filed a brief relying upon it and urging that the convictions be affirmed. *Id.*

The result below therefore leaves Petitioners with the worst of both worlds. If they congregate peacefully without signs at the Soviet Embassy, they run the grave risk of arrest and prosecution. Meanwhile their declaratory and injunctive action filed to prevent that very result was dismissed on the basis of an advisory and unenforceable reading of the second clause. The Constitution does not permit a result which leaves the rights of speech and assembly in such a state of suspense.

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[26] On March 14, 1970, they arrested a group at the Statler Hilton Hotel picketing against the Gridiron Club for discriminating against women because the Hotel was within 500 feet of the Soviet Embassy. 122 Cong. Rec. 31033 (1972). In May 1969, they arrested someone picketing against the Vietnam War on the White House sidewalk because this was within 500 feet of the Blair House used by foreigners. *Id.* In April 1970, a Superior Court judge decided the second clause should be narrowed to apply only to congregations within 500 feet of foreign buildings having a direct relationship to the nation involved. *Id.* at 31033-31034. This formulation, which is not binding on any other judge in the District of Columbia, is itself vastly overbroad. It would allow the police to disperse Petitioners when they congregate with their attorneys, whose offices overlook Sakharov Plaza and are within 500 feet of the Soviet Embassy, to discuss the portions of this Brief relating to the Soviet Union.

C. The Second Clause Is Unconstitutional Even As Rewritten By The Court Below.

Under the majority's construction the second clause makes it a crime:

> "'. . . to congregate within five hundred feet of any such building or premises, and refuse to disperse after having been ordered to do so by the police . . .' [when they reasonably believe a threat to the security or peace of the embassy is present]" (App. 43a and 3a n.1).

This reading is overbroad and vague as applied to Petitioners and on its face.

It allows the police to disperse a group merely when a threat to the "peace" of the building occurs. The term "peace" is nowhere further defined or limited. The Court has made clear that such a statute is "unconstitutionally vague in its overly broad scope." *Cox* v. *Louisiana*, 379 U.S. 536, 551 (1965). *Accord, e.g., Edwards* v. *South Carolina*, 372 U.S. 229, 235-239 (1963). The deprivation of First Amendment speech and assembly rights caused by the rewritten statute is greater than statutes like those involved in *Cox*. In *Cox* a "'breach of the peace'" was at least limited to mean "'to agitate, to . . . molest, to interrupt, to hinder, to disquiet.'" 379 U.S. at 551. In this case the majority concluded that the government can punish peaceful speech when the words or messages conveyed are annoying or insulting to foreigners (App. 51a, 53a). Under the majority's reading, the police can disperse three contra supporters quietly singing "We Shall Overcome" 499 feet from the Nicaraguan Embassy.

The term "threat to the security" of a building has similar flaws. Respondents have emphasized their affiants' belief "that the 500 foot buffer . . . is essential . . . to provide a minimally acceptable level of security" and that the "need for the 500 foot rule is particularly acute in the District of Columbia" (J.A. 22; *see id.* 18-19, 24-25, 27). Given such pronouncements, Respondents may believe that all congregations of protesters within the zones pose an unacceptable security threat and should be dispersed. The majority's construction does nothing to limit Respondents from continuing to act accordingly.[27]

IV. BOTH CLAUSES VIOLATE EQUAL PROTECTION BECAUSE THEY ALLOW INSULTING SIGNS AND CONGREGATIONS BY PARTIES TO LABOR DISPUTES BUT NOT OTHERS.

A. Equal protection applies through the Due Process Clause of the Fifth Amendment to the federal government, *e.g.*, *Davis* v. *Passman*, 442 U.S. 228, 234-235 (1979), and the District of Columbia, *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). In the equal protection context, the Court is concerned "that conduct which could be and is properly prohibited be permitted if indistinguishable from other permitted conduct." *Carey* v. *Brown*, 447 U.S. 455, 487 (1980) (Rehnquist J., dissenting).

> "The question, therefore, is . . . whether the appellees' prohibited conduct can be said to share the same characteristics of the conduct which is permitted" (*id.* at 484).

D.C. Code § 22-1116 states:

> "[N]othing contained in [§ 1115] shall be construed to prohibit picketing, as a result of bona fide labor disputes regarding . . . buildings or premises occu-

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[27] These infirmities are compounded by several others inherent in the majority's construction. It allows the police to order dispersals when a threat to an embassy "is present". It does *not* require that the group dispersed pose the threat. The "compelling answer to this contention is that constitutional rights may not be denied simply because of hostility to their . . . exercise," *Watson* v. *Memphis*, 373 U.S. 526, 535 (1963), or because of the conduct of others. The majority's formulation allows dispersal when a threat is present only at "the embassy". If this means what it says, the second clause is now inoperative at the many consulates, legations and other non-embassy foreign buildings where Petitioners and others wish to congregate.

pied, for business purposes . . . by representatives of foreign governments."

Thus the legislature has allowed all parties to specified labor disputes freely to utter precisely the same speech, and engage in precisely the same conduct, which is prohibited to Petitioners. Experience shows that parties to rough and tumble American labor disputes can be at least as insulting as these straight-arrow Petitioners. As a result, both the display of signs clause, and the congregating clause, violate equal protection.

B. *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972), involved an ordinance which prohibited picketing within 150 feet of a school building, but which excepted peaceful picketing of any school involved in a labor dispute. The Court held the ordinance unconstitutional, concluding that the city could not vindicate its interest in preventing disruption and violence "by the wholesale exclusion of picketing on all but one preferred subject" (*id.* at 101), but instead only by "focusing on the abuses and dealing evenhandedly with picketing regardless of subject matter" (*id.* at 102).

Carey, *supra*, 447 U.S. 455, involved an Illinois picketing statute which contained an exception even narrower than the one in *Mosley*. *See* 447 U.S. at 457, 461 n. 5. The Court concluded that the statute, by allowing labor picketing (even if only at places of employment) and prohibiting non-labor picketing (even if primarily in residential neighborhoods), was constitutionally indistinguishable from the one involved in *Mosley*. *Id.* at 462-463, 471. Though the Court agreed that the residential privacy interest "is certainly of the highest order" (*id.* at 471), it refused to distinguish *Mosley* on that ground. "[E]ven the most legitimate goal may not be advanced in a constitutionally impermissible manner." *Id.* at 464-465.[28]

[28] While both clauses are invalid solely because of the labor exception, the first clause violates equal protection for additional reasons. It prohibits a single demonstrator—even President Reagan—from displaying an anti-Soviet sign within 500 feet of Sakharov Plaza. But it allows President Reagan to give an anti-Soviet "Evil Empire" speech on worldwide television, allows newspapers with insulting headlines and articles to be displayed in vending machines in front of the Embassy and even placed in the Ambassador's mailbox, and allows hostile demonstrators on the Embassy sidewalk orally to insult the Ambassador at the top of their lungs. *Zaimi* v. *United States*, 476 F.2d 511, 526-527 (D.C. Cir. 1973).

Given *Mosley* and *Carey*, this is an *a fortiori* case. The exception for labor picketing in §§ 1115 and 1116 is at least as discriminatory, irrational, and content-based as the one invalidated in *Mosley*, and more so than the one invalidated in *Carey*.

C. The majority rejected Petitioners' equal protection argument by relying solely (App. 48a n. 19) upon *Jewish Defense League, Inc.* v. *Washington*, 347 F. Supp. 1300 (D.D.C. 1972) (three judge court) ("*J.D.L.*"). *J.D.L.* attempted to distinguish *Mosley* on the ground that the government's interest in affording protection to diplomats was of a "higher quantum" than merely protecting school children from disruption. *Id.* at 1301.[29] But the majority's reliance upon the "higher quantum" argument was misplaced.

First, in *Carey*, decided after *J.D.L.*, this Court rejected that precise type of argument. 447 U.S. at 464, 471. Second, the "higher quantum" argument is wrong on its merits. In the equal protection context, it not only proves too much, but is inherently contradictory and self-defeating. The more important the governmental interest behind a criminal law, the *less* justification there is to exempt any similarly situated parties from it. If the avoidance of insult to foreigners in the 500 foot zones is an interest so vital as to be a "profound constitutional

[29] *J.D.L.* also argued that labor picketing as a class might not be as disturbing as non-labor picketing. *Id.* at 1301-1302. This Court flatly rejected that argument in *Mosley*, *supra*, 408 U.S. at 100-103, and *Carey*, *supra*, 447 U.S. at 460-462.

value[]" (App. 8a) that is "inseparable from our nationhood" (*id.* at 18a), the legislature would not allow labor picketers freely to compromise that interest everywhere within the zones. That the legislature has permitted insulting labor picketing and congregating in the zones wholly undermines the "higher quantum" rationale.

Nor is there merit to the argument that the exempted conduct might be severed from the prohibited conduct to save the latter. *See* App. 48a-49a and n.20; and *J.D.L., supra*, 347 F. Supp. at 1302. Part of a statute can be severed only when the result is to allow persons to engage lawfully in activity which otherwise would be prohibited by the severed provision. Thus, if a statute prohibits A, B, and C, and section A is invalidated leaving B and C in force, persons become free to engage in what otherwise would be prohibited by A.[30] Severance cannot be legitimate when the result is for courts to impose criminal sanctions for activity expressly legalized by the legislature.

It is basic that individuals cannot be convicted of a crime unless a statute unambiguously prohibits the conduct in which they engage, *Dowling* v. *United States*, 473 U.S. 207, 213-218 (1985), and that the Congress, instead of Article III courts, defines crimes, *Liparota* v. *United States*, 471 U.S. 419, 424 (1985). Were the § 22-1116 labor exemption stricken, labor picketers could be convicted of crimes created by courts for engaging in conduct which Congress has flatly determined is legal.

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[30] The same is true when exceptions to exceptions to a criminal statute are severed. If an exception to an exception is severed, a party need not comply with it to meet the exception to the statute's criminal coverage. *E.g., Regan* v. *Time, Inc.*, 468 U.S. 641, 644-646 (1984).

CONCLUSION

The decision below should be reversed, and the case remanded with directions to grant the declaratory and injunctive relief sought by Petitioners.

Respectfully submitted,

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ADDENDUM

D.C. Code § 22-1115 as construed in *Zaimi* v. *United States*, 476 F.2d 511, 517 n.41 (D.C. Cir. 1973). *See* App. 35a.

It shall be unlawful

[1] to display any flag, banner, placard, or device designed or adapted

[a] to intimidate, coerce, or bring into public odium any

[i] foreign government,

[ii] party,

[iii] or organization,

[iv] or any officer or officers thereof, *or*

[b] to bring into public disrepute

[i] political [acts, views, or purposes],

[ii] social [acts, views, or purposes], or

[iii] economic acts, views, or purposes of any

[i] foreign government,

[ii] party, or

[iii] organization, *or*

[c] to intimidate, coerce, harass, or bring into public disrepute any

[i] officer or officers or

[ii] diplomatic or consular representatives of any foreign government, *or*

[d] to interfere with the free and safe pursuit of the duties of any diplomatic or consular representatives of any foreign government,

within five hundred feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, or for other official purposes, except by, and in accordance with, a permit issued by the superintendent of police of the said District; *or*

[2] to congregate within five hundred feet of any such building or premises, and refuse to disperse after having been ordered so to do by the police authorities of the said District.

RESPONDENT'S

BRIEF

Supreme Court, U.S.
FILED
MAY 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.86-803

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

Michael Boos, J. Michael Waller and
Bridget Brooker,

Petitioners,

v.

Marion S. Barry, Jr., Maurice T. Turner,
The Distict of Columbia and
Father R. David Finzer,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT
COLUMBIA CIRCUIT

BRIEF OF RESPONDENT, FATHER R. DAVID FINZER

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TABLE OF CONTENTS

	Pages
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT	4
ARGUMENT:	
I. FIRST AMENDMENT GUARANTEES OF FREE SPEECH AND ASSEMBLY MUST PREVAIL OVER INCONSISTENT STATUTE IN D.C.CODE	6
A. The Court Must Apply Strict Scrutiny In Order To Satisfy The Infringement On The Basic Constitutional Rights That Exist Here	8
B. The Second Clause Of §22-1115 Fails The "Strict Scrutiny" Test As There Exist Less Restrictive and Less Drastic Means Available To Achieve Its Ends	11
C. The Seccnd Clause Of §22-1115 Also Fails To Meet The Test Established By The Court In Taxpayer For Vincent.....	18
II. THE FIRST CLAUSE OF D.C. CODE §22-1115 IS BOTH UNDER AND OVER INCLUSIVE IN THE MANNER IN WHICH IT PROHIBITS ASSEMBLY, SPEECH, AND EXPRESSION	20
CONCLUSION	29

TABLE OF AUTHORITIES

Cases:

	Pages
Baker v. Carr, 369 U.S. 186 (1962	11
Bethel School District No. 403 v. Fraser, 54 U.S.L.W. 5054.....	26
Buckley v. Valeo, 424 U.S.1 (1976)	8,9
Cantwell v. Connecticut, 310 U.S. 296 (1940).....	17
CISPES v. FBI, 770 F.2d 468 (5th Cir.1985)....	19,20
Coates v. Cincinnati, 402 U.S. 611 (1971)	16,23
Collins v. Smith, 578 F.2d 1197 (7th Cir.)....	26
Cert Denied, 439 U.S. 916 (1978)	
Connally v. Gerneral Construction Co., 269 U.S. 385 (1926).....	21
Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530(1980)	27
Corneilius v. NAACP Legal Defense and Educational Fund,Inc., 105 S.Ct. 3439 (1985).....	27
DeJorge v. Ortega, 299 U.S. 333 (1937).....	19
Elrod v. Burns, 422 U.S. 347 (1976).....	11
Gibson v. Florida Legislative Investigative Commission, 372 U.S. 539 (1963)	10
Gooding v. Wilson, 4095 U.S. 518 (1972).....	25
Gray v. Sanders, 372 U.S. 368 (1963).....	11

Graynard v. City of Rockford, 408 U.S. 104 (1972).....21,22	
Hague v. CIO, 3097 U.S. 496 (1939)	13,17,23
In Re Primus, 436 U.S. 412 (1978)	11
Korematsu v. United States, 323 U.S. 214 (1944)	9
Kusper v. Pontikes, 414 U.S. 51 (1973).....	10
Loving v. Virginia, 388 U.S.1 (1967)	10
Members Of The City Council of Los Angeles v. Taxpayers For Vincent, 104 S.Ct. 2118 (1984)	18
NAACP v. Clairborne Hardware Co., 458 U.S. 886 (1982) 8,9,10	
Niemotke v. Maryland, 340 U.S. 268 (1951)	27
Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983)	24
Police Department of Chicago v. Mosley, 408 U.S. 92 (1972)	23,24
Regan v. Time, Inc., 104 S.Ct. 3262 (1984)	28
Roberts v. United States Jaycees, 104 S.Ct. 3244 (1984)	28,29
Saico v. New York, 344 U.S. 558 (1948)	17
Schneider v. New Jersey, 308 U.S. 147 (1939) ...	17
Shapiro v. Thompson, 394 U.S. 618 (1969)	10,11
Shuttelsworth v. Birmingham, 394 U.S. 147 (1969).....	14,15,16 16,23,28
Terminelo v. Chicago, 337 U.S. 147 (1969)	26

Thornhill v. Alabama, 310 U.S. 88 (1940) 25

United States v. Grace, 461 U.S. 171 (1983) .. 13,22

United States v. O'Brien, 391 U.S. 367 (1968) 19

White House Vigil For The ERA Committee v.Clark 746 F.2d 1518 (D.C. Cir.1984) 13

Widman v. Vincent, 454 U.S. 263 (1981) 24

Williams v. Rhodes, 393 U.S. 22 (1968) 11

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 10

Zamimi v. United States, 476 F.2d 511 (D.C.Cir.1973)..... 10

CONSTITUTIONAL PROVISIONS

First Amendment in passim

STATUTES

18 U.S.C. §112(c) 19
Code Of The District Of Columbia §22-1115 in passim

TEXT BOOKS

J.Novak, R.Rotunda, & J. Young, ... 9,10
Handbcok on Constitutional Law (1978)

STATEMENT OF THE CASE

Respondent, R. David Finzer, formerly a priest in the American Episcopal Church (Anglican), was also previously Chairman of the Young Conservative Alliance of America, Inc. which was/is a group of young conservative citizens who hold politically conservative viewpoints and wish to express and make their viewpoints known in a peaceful manner.

Respondent Finzer is the only member of the original parties to the underlying cause of action with any official ties to the Young Conservative Alliance of America, Inc. As such, Respondent Finzer was always considered the speaker and leader of the coalition group as well as for the individual members of the Alliance.

At a given point in time political rallies were held in the District of Columbia outside and in front of the Soviet and Nicaraguan embassies.

Pursuant to the Code of the District of Columbia, D.C. Code §22-1115 (1981) the individuals taking part in these political rallies were required to stay at least 500 feet away from the Embassies because they

were carrying banners, placards, flags and other devices which were critical of both governments, their acts and their policies.

Among the signs being carried were signs stating "SOLIDARITY" and "RELEASE SAKHAROV" near the Soviet Embassy and signs stating "STOP THE KILLING" near the Nicaraguan Embassy.

The Respondent Finzer and the petitioners desire to engage in the peaceful expression and exchange of ideas and views on the public streets and public sidewalks of the District of Columbia. Respondent Finzer and the petitioners are desirous of continuing to advocate their conservative views before and in front of official foreign buildings.

However, Respondent Finzer and the petitioners are being prohibited from peacefully carrying flags, banners, placards and other devices within 500 feet of official foreign buildings because of the threat of arrest and prosecution pursuant to D.C. Code §22-1115.

Respondent Finzer and the petitioners have also been prohibited from peacefully congregating either together or with two or more persons on the public streets and/or public sidewalks within 500 feet of

official foreign buildings, including, in this instance, the Soviet and Nicaraguan embassies.

Respondent Finzer and the petitioners sought and still seek the opportunity to kneel in prayer for the dead before the official foreign building on the public streets and/or sidewalks within 500 feet of those buildings.

However, Respondent Finzer and the petitioners have been and are presently inhibited from peacefully congregating because of the threat of arrest and prosecution under D.C. Code §22-1115.

Section 22-1115 of the D.C. Code has two clauses. The first clause prohibits the display of signs, flags, banners, placards or other devices designed to bring into "public odium" or "public disrepute" any foreign government - within 500 feet of its official buildings. The second clause makes it unlawful to congregate within 500 feet of a foreign official building "and refuse to disperse after having been ordered so to do by the police...."

Respondent Finzer and the petitioners desire only to engage in a peaceful expression of [illegible] and only

on the public streets and public sidewalks of the District of Columbia which are open to all members of the general public. Respondent Finzer and the petitioners have not in the past, nor do they desire in the future to engage in any violence, to threaten, harass, intimidate, or interfere with any foreign official, or to in any way encroach upon or demonstrate on the private property of any foreign government.

Respondent Finzer and each petitioner is prohibited from congregating within 500 feet of official foreign buildings amd all are being prohibited from peacefully carrying flags, banners, placards, and devices within 500 feet of official foreign buildings because of the threat of arrest and prosecution under D.C. Code §22-1115.

SUMMARY OF ARGUMENT

The case at bar presents a classic confrontation between the absolute provisions of the First Amendment to the Constitution and an inconsistent statute of the District of Columbia which curbs the exercise of the protected freedoms of assembly, speech and expression.

The statute which prohibits protests and signs

which cast a negative pall over a foreign government must be conducted at least 500 feet away from the focal point of that protest, while a positive gathering can approach the front doors of the foreign government office building. Thus, there exists a statute whose first section discriminates against certain speech and certain actors. The statute is both overbroad, and is violative of the time, place and manner restriction established by this Court to balance the rights of speech and assembly against the maintenance of order and national security.

In addition, the statute rests total discretion as to what may be a negative pall over a foreign government to the police of the District of Columbia. The statute provides no formula, guidelines or standards by which the police are to permit or prohibit certain political gatherings. This grant of unbridled, unchecked, and unfettered discretion in the hands of the police is, based on a long line of Supreme Court cases, constitutionally impermissable.

The second clause of the District of Columbia statute also rests unfettered discretion in the hands

of the police to disperse all congregations of three or more persons within 500 feet of a foreign government official building.

As with the first clause, this Court has held that such unchecked discretion resting with the police is constitutionally infirm.

Further, in order to permit the infringing upon First Amendment freedoms, the Court must employ a strict scrutiny test to examine the legislation against the fundamental rights impacted upon.

In the case at bar, the strict scrutiny test was not employed in balancing the interests of the protestors as against the interests of national security. When a balancing test is performed the statute at issue will fail and be declared unconstitutional.

Hence, the opinion of the Court of Appeals of the District of Columbia must be reversed.

ARGUMENT

I. FIRST AMENDMENT GUARANTEES OF FREE SPEECH AND ASSEMBLY MUST PREVAIL OVER INCONSISTENT STATUTE IN D.C. CODE

At the outset, it is apparent that there is a

conflict between the provisions of the First Amendment to the United States Constitution and the Code of the District of Columbia, §22-1115.

The First Amendment provides that "Congress shall make no law... abridging the freedom of speech... or the right of the people peaceably to assemble...." To the contrary stands the second clause of §22-1115 - stating after specifically limiting the area in which free speech may be occasioned, "or to congregate within 500 feet of any such building or premises, and refuse to disperse after having been ordered so to do by the police authorities of the said District."

This second clause of §22-1115 prohibits all congregations of three or more people, Zamimi v. United States, 476 F.2d 511 (D.C.Cir 1973), within 500 feet of a foreign official building regardless of how peaceful the congregation might be, and regardless of the First Amendment. A restriction so broad and overreaching must be held unconsitutional.

That which is prohibited by the second clause of §22-1115, congregation, is synonomous with assembly. The freedom to assemble - to associate has been

recognized as a separate First Amendment right since this Court's decision in NAACP v. Alabama, 357 U.S. 449 (1958). The right to assemble stands as a distinct and fundamental right, equal to rights of freedom of speech and religion within the amendment.

Freedom of association is a preferred right deriving its position as such from implications naturally flowing from First Amendment guarantees, Buckley v. Valeo, 424 U.S.1 (1976). This freedom is recognized, at a minimum, as a derivative safeguard on an individual's right of speech and assembly when exercised in a group, NAACP v. Alabama, supra.

This freedom makes possible political association and political expression, without which a democratic system would be unable to exist. To be meaningful, the freedom to associate and promote ideas must extend to each fundamental aspect of life.

A. The Court Must Apply Strict Scrutiny In Order To Satisfy The Infringement On The Basic Constitutional Rights That Exist Here

The First Amendment to the United States Constitution is couched in terms which permit no infringement upon the rights guaranteed thereunder.

While the language is clear upon its face, the explicit terms used therein have rarely, if ever, been accorded full judicial support.

In order to avoid rendereing the Constitution and the rights guaranteed therein null and void, this Court has determined that specific standards must be met prior to infringing upon or cancelling a Constitutional right. In every instance in which government attempts to restrict guaranteed freedoms, this Court demands that the appropriate judicial standard be met.

Therefore, whenever government legislatively infringes on the fundamental rights of its citizens, courts must employ the most "exacting scrutiny" in determining the validity of that law. NAACP v. Alabama, 357 U.S. 499 (1958); Buckley v. Valeo, 424 U.S. 1 (1976); Korematsu v. United States, 323 U.S. 214 (1944). Because this standard demands the highest level of governmental explanation, any statute which classifies, distinguishes or discriminates in relation to fundamental rights will rarely, if ever, survive due process or equal protection analysis. J. Novak, R. Rotunda & J. Young, Handbook on Constitutional Law,

522-27 (1978). Implementation of laws which are neutral on their face but are discriminatorily enforced must also fail. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

To encroach upon the rights and freedoms guaranteed under the First Amendment, the government, must show: 1) the infringment bears a reasonable relation to a legitimate governmental interest; 2) the legitimate governmental interest is compelling; and 3) the means used by the government are the least restrictive and least drastic means available to achieve its ends. Kusper v. Pontikes, 414 U.S. 51 (1973); Gibson v. Florida Legislative Investigative Commission, 372 U.S. 539 (1963); NAACP v. Alabama, 357 U.S. 499 (1958). This test, the "strict scrutiny test", must be applied to test the legislation at issue herein. When tested by this standard, the legislation does not pass constitutional muster.

The "strict scrutiny" standard of review has been applied in cases involving numerous fundamental rights; to be free from racial discrimination, Loving v. Virginia, 388 U.S. 1 (1967); to travel, Shapiro v.

Thompson, 394 U.S. 618 (1969); to vote, Williams v. Rhodes, 393 U.S. 22 (1968), and the correlative right to have one's vote weighted equally with any other single vote. Baker v. Carr, 369 U.S. 186 (1962); Gray v. Sanders, 372 U.S. 368 (1963). This standard of review is demanded in the case at bar because the fundamental right of association is indicated here. Elrod v. Burns, 422 U.S. 347,362 (1976); In Re Primus, 436 U.S. 412,432 (1978).

In practical terms, the "strict scrutiny" test requires the examination of whether the desired ends and means chosen match up, it demands nothing less than a compelling justification for the chosen action.

The second clause of §22-1115 cannot pass the "strict scrutiny" test and therefore that clause must be held to be constitutionally infirm.

B. The Second Clause Of §22-1115 Fails The "Strict Scrutiny" Test As There Exist Less Restrictive and Less Drastic Means Available To Achieve Its Ends

Respondent Finzer recognizes that the government has a compelling and a legitimate interest in maintaining and preserving the security of diplomatic personnel

both at home and abroad.

However, the issue left open is whether there exist less drastic and less restrictive alternatives available for the government to achieve those compelling and legitimate ends.

The language of §22-1115 is clear and unambiguous - the police have the unfettered authority to order any assembly of people to disperse. There are no standards to be applied, no issues to resolve, no questions to ask. Once the police order dispersal a refusal to do so is unlawful subjecting those persons to arrest and/or prosecution.

The purpose and result of this statute is to limit the right of citizens to lawfully assemble on public sidewalks, or on public streets within the District of Columbia if that assembly is within 500 feet of a foreign office building.

In the case herein presented, Respondent Finzer and the petitioners, were at all times on the public sidewalks and the public streets. At no time did they break the plain of the Embassies.

Access to public sidewalks and public streets "is a small but invaluable part of every American

heritage...." Sidewalks, like streets and parks, are places whose title has immemorially been held in trust for the use of the public. As such, they occupy a privileged position in the hierarchy of First Amendment jurisprudence." White House Vigil for the ERA Committee v. Clark, 746 F.2d 1518,1526 (D.C. Cir. 1984); citing with approval, Hague v. CIO, 307 U.S. 496 at 515 (1939); United States v. Grace, 461 U.S. 171, (1983).

Therefore, access to the public streets and sidewalks of the District of Columbia must be guarded and protected diligently. Encroachment upon the right to be on the sidewalk and the streets or to assemble there must be weighed carefully and not lightly considered or permitted.

Yet, under the language employed by Congress in clause two of §22-1115, the police have absolute unfettered authority to trample and destroy the rights of the people to peacefully assemble on the public streets and sidewalks of the District of Columbia for no other reason than such assembly is taking place within 500 feet of a foreign office building.

The 31 words in the second clause of the statute do not anywhere or in any manner address, discuss or remotely hint at the standards which should govern the police in fulfilling their functions. Therefore, the statute authorizes the destruction of First Amendment rights without standards - without guidelines - without balancing.

The police have absolute and total authority to disperse and ban all assemblies within 500 feet of a foreign official building. The banned assemblies can be for political purposes, for non-political purposes, for lawful purposes or for no purpose at all.

Such unchecked absolute authority is constitutionally impermissable as it is neither the least restrictive nor least drastic method by which the government can pursue its legitimate functions.

This Court and lower federal courts have consistently and unhesitatingly held that laws, such as the second clause of §22-1115, which leave the full regulation of speech or assembly to the unchecked or uncontrolled will of public officials, are invalid and constitutionally infirm.

In Shuttlesworth v. Birmingham, 394 U.S. 147 (1969)

the petitioner was convicted for violation of a city ordinance which prohibited any parade, procession or other public demonstration without first securing a permit from the City commission. This challenged, and subsequently stricken ordinance, required the commission to issue permits "unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convention requires that it be refused." Shuttlesworth, 394 U.S. at 149-50.

This Court in flatly rejecting the standards and guidelines for permits stated:

> There can be no doubt that the Birmingham ordinance, as it was written, conferred upon the City Commission virtually unbridled and absolute power to prohibit any 'parade' 'procession', or 'demonstration' on the city's streets or public ways. For in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience.' This ordinance as it was written, therefore, fell squarely within the ambit of the many decisisons of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional. (Footnote omitted; id. 150-151).

The statute here suffers from a greater infirmity in that it offers no guidelines whatsoever. The 31

words in the second clause of §22-1115 discuss only police authority to disperse and the consequences of failing to disperse.

In Coates v. Cincinnati 402 U.S. 611 (1971) the Court upheld a First Amendment challenge to a statute which made it unlawful for "three or more persons to assemble... on any of the sidewalks ... and there conduct themselves in a manner annoying to persons passing by ...."

This Court held that:

> The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people. If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct. And such a prohibition, in addition, contains an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens (Footnotes omitted; id. 615-616).

As in Shuttlesworth, the city of Cincinnati at least attempted to formulate guidelines. In the case at bar there are no standards or guides formulated or created to instruct the police on when to disperse.

The statute at issue has no guidelines and is without formula. The statute is therefore even more repugnant, offensive and less constitutionally permissable.

This Court has also striken, on First Amendment grounds, other statutes where unfettered discretion has been granted to government officials: Saico v. New York, 334 U.S.558 (1948) (ordinance prohibited the use of loudspeakers on public places without permission of the chief of police whose discretion was unlimited); Cantwell v. Connecticut, 310 U.S. 296 (1940) (ordinance required license to distribute religious literature without standards for the exercising of licensing discretion); Schneider v. New Jersey 308 U.S. 147 (1939) (ordinance prohibited distributing leaflets without a license and provided no standards for issuance of licenses); Hague v. CIO, 307 U.S. 496, (1939) (plurality opinion) (statute permitted city to deny permit for a public demonstration subject only to the uncontrolled discretion of the director of public safety).

In light of each and all of the aforementioned cases, the second clause of D.C. Code §22-1115, which threatens the fundamental right of assembly cannot

stand.

C. The Second Clause of §2215 Also Fails To Meet The Test Established By The Court In Taxpayers For Vincent

In Members of the City Council of Los Angeles v. Taxpayers for Vincent, __U.S.__, 104 S.Ct. 2118 (1984) the Court established a four part test for determining the constitutionality of viewpoint-neutral legislation:

> [A] government regulation is sufficiently justified if [1] it is within the constitutional power of the government; [2] if it furthers an important or substantial government interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater then is essential to the furtherance of that interest. Id. at 2129.

The second clause of §22-1115 fails this test as well.

It can be argued that the second clause of §22-1115 is both within the power of the government and that the statute furthers an important governmental interest. However, the law is not narrowly tailored to serve the governmental interest asserted.

The second clause of §22-1115 prohibits congregations without concern as to flags, banners, or

the peaceful nature of the assembly. As discussed supra, the police have full authority to order each and every assembly of three (3) or more persons to disperse without concern as to the content or nature the of assembly or the First Amendment rights being asserted. This is not a statute wherein the restriction is "no greater than is essential to the furtherance of [the government] interest." United States v. O'Brien, 391 U.S. 367, 377 (1968).

In CISPES v. FBI, 770 F.2d 468 (5th Cir. 1985) the Fifth Circuit construed a similar congregation clause in 18 U.S.C. §112(c) which is applicable to demonstrations against Embassies located outside the District of Columbia, in such a way as to allow peaceful demonstrations even if they were in "direct relationship" to the embassy. That court held that there must be an intent to violate some other prohibition in the statute.

The Fifth Circuit emphasized:

> Thus, the statute does not prevent simple peaceable assembly for the purpose of lawful discussion, which of course cannot be made a crime DeJorge v. Orega, 299 U.S. 333, 57 S.Ct. 255, 81 LED 278 (1937). It merely prohibits an assembly of persons with the specific intent to commit the

offences for which we have held supra the government may constitutionally proscribe, and then only within 100 feet of a protected building. Id. at 477.

Therefore, even applying a test more relaxed than strict scrutiny, the second clause of D.C. Code §22-1115 still must be found to be in violation of the First Amendment, by failing to satisfy the time, place and manner restrictions required by this Court.

III. THE FIRST CLAUSE OF D.C. CODE §22-1115 IS BOTH UNDER AND OVER INCLUSIVE IN THE MANNER IN WHICH IT PROHIBITS ASSEMBLY, SPEECH, AND EXPRESSION

The first clause of D.C. Code §22-1115 makes it

> unlawful to display any flag, banner, placard, or device designed to intimidate, coerce, or bring into public odium... or to bring into public disrepute... any foreign government... or to intimidate or coerce, harass, or bring into disrepute any officer or officers... of any foreign government, or to interfere with the free and safe pursuit of the duties of any diplomatic or consular representatives of any foreign government, within five hundred feet...

of any official foreign building.

The statute does not attempt, nor does it define any of its prohibitions. Terms such as "public odium" and "public disrepute" go undefined, and presumptively are left to the definitions and determinations of the police of the District of Columbia. As illustrated

supra, the governmental relinquishing of total authority over constitutionally protected rights to a public official is constitutionally infirm. This statute may therefore, be found to be void for vagueness.

The primary concern of a vagueness question is whether or not the law gives adequate notice of the standards to which conduct must conform. See: Connally v. General Constuction Co., 269 U.S. 385,391 (1926). As often stated, D.C. Code §22-1115 provides no standards whatsoever - unless undefined terms are to be considered specific. A result of that order would fly in the face of the doctrine.

The giving of adequate notice was until this Court's decision in Graynard v. City of Rockford, 408 U.S. 104 (1972) the major concern of the doctrine.

In Graynard, the Court identified two other additional "important values" which are offended by vague laws:

> Second,...[a] vague law impermissably delegates basic policy matters to policemen, judges and juries for resolution on ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, ... where a vague statute abut[s] upon sensitive areas of

basic First Amendment freedoms, 'it' operates to inhibit the exercise of those freedoms.' (Footnotes omitted).

Graynard, 408 U.S. at 108-9.

Clearly, D.C. Code s22-1115, falls squarely within the additional values enumerated in Graynard, thereby being constitutionally offensive as overly vague.

To permissably restrict freedom of speech/expression, as it relates to picketing, the government must establish "reasonable time, place, and manner regulations as long as the restrictions 'are content - neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" United States v. Grace, 461 U.S. 171,177 (1983). (Citations omitted).

D.C. Code §22-1115 makes neither an attempt to establish "reasonable time, place and manner regulation" nor is the statute content - neutral.

On its face the statute regulates on the basis of content - thus the statute fails the Grace test and must therefore be held to be unconstitutional as it fails to satisfy the time, place and manner restrictions announced in Grace, supra.

Often times it is difficult, even for experts to determine whether a protest against the activities of a foreign government is sufficient to bring that government into public odium and/or disrepute. Clearly, a protest may raise issues and bring about public debate - but it is not always clear when a discussion of the issues turns to odium and disrepute. However, Congress, through the passage of D.C. Code §22-1115, determined that ordinary street police, not government experts, not political commentators, not political scientists, but street police must make the distinction between public debate and public odium and disrepute. Clearly, this runs afoul of Shuttlesworth v. Brimingham, 394 U.S. 147 (1969), Coates v. Cincinnati, 402 U.S. 611 (1971) and Hague v. CIO, 307 U.S. 496 (1939) and must therefore be stricken as constitutionally infirm.

The first clause of D.C. Code §22-1115 attempts to restrict the freedom of expression if it in any way casts a cloud over the public standing of a foreign government. The First Amendment prohibits such attempted governmental restrictions. Police

Department of Chicago v. Mosley, 408 U.S. 92 (1972).

As the statute restricts expression on the basis of content, the government bears a heavy burden and the statute must survive the "most exacting scrutiny", Widman v. Vincent, 454 U.S. 263,276 (1981). To sustain a constitutional challenge to the validity of a given statute, the government must show that the statute "is necessay to serve a compelling state interest and that is is narrowly drawn to achieve that end." Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37,45 (1983).

The government argument that the statute is necessary meets only half have the Perry requirement. The other portion of the test demands that the statute be "harrowly drawn".

It is the second prong of the Perry requirement which the statute fails to meet. The first section of the statute by its own words dooms it to failure. Section 22-1115 makes it unlawful to display flags, banners, placards or any other devise designed to intimidate, coerce or bring into public disrepute or odium. In short, anything and everything is banned within 500 feet of the embassies which, in the opinion

of a street police officer, should be banned. In addition to its other constitutional deficiences the statute is not narrowly drawn.

The statute therefore, additionally suffers the malady if being constitutionally deficient as it is overbroad.

Statutes which are overbroad make illegal activities which are protected by the First Amendment. Thornhill v. Alabama, 310 U.S. 88 (1940). As this Court stated in Thornhill , overbroad statutes are constitutionally offensive because they lend themselves "to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, result in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." Thornhill, 310 U.S. at 97-98.

The overbreath doctrine protects against chilling the assertion of constitutional rights as well as prior restraints on speech/expression. Gooding v. Wilson, 405 U.S. 518 (1972).

The statute prohibits those signs, banners, and

placards which cause public odium or disrupte to befall a foreign government. The banned expression is that negative expression which is likely to lead to public debate. The banned expression is that expression which is the most needing of protection. After all it is an easy and convenient matter to permit only speech/expression of which we approve, it is a much more difficult matter, and a truer test of our Constitution to protect the speech/expression which is not approved of. See: Bethel School District No. 403 v. Fraser, 54 U.S.L.W. 5054 (offensive form of expression may not be prohibited). Terminelo v. Chicago, 337 U.S. 1 (1949) (one of the purposes of freedom of speech is to invite dispute - a public airing of ideas or sharing of thoughts).

So sacred is this First Amendment freedom of speech/expression that this Court has protected the most offensive speech and expression in the most offended environments. The protection of Nazi marchers in complete military regalia in a community which was predominately Jewish, many of which were Holocaust survivors. Collins v. Smith, 578 F.2d 1197 (7th Cir.) cert.denied, 439 U.S. 916 (1978).

So too, when government, by statute, seeks to regulate the time, place and content of speech/expression this Court must insure that the supression is not barred merely on a "public officials (disapproval of) the speakers' views." Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530,536 (1980), quoting Niemotko v. Maryland, 340 U.S.268 282 (1951) (Frankfurter, J. concurring). The Court must assure that the speech most necessary of protection is protected and that the restrictions placed upon the First Amendment are not the result of bias, Cornellius v. NAACP Legal Defense and Educational Fund, Inc., ___U.S.__, 105 S.Ct. 3439 (1985) or lack of intellectual understanding.

By classifying, into acceptable - permissable speech, and unacceptable - unlawful speech, Congress discriminates against those ideas of which it does not approve. As the statute stands, acceptable - permissable expression can be engaged in right up to the foreign official buildings' front door, while the unacceptable - unlawful speech must remain 500 feet or more away from the foreign official building. If

nothing else is clear it is this - Congress has precensored speech solely on the basis of content - a prior restraint which this Court has held Constitutionally impermissable. Shuttlesworth v. Birmingham, 394 U.S. 149, 150-51 (1969).

As this Court held in Regan v. Time, Inc. __U.S.__, 104 S.Ct. 3262 (1984), a law which is grounded on the content or subject matter of the speech/expression is violative of the First Amendment and a governmental showing of a compelling interest will not be sufficient to save the law from being held unconstitutional. Here the alleged governmental interest is national security - an interest that is patently insufficient to trod upon rights declared in the Constitution of the United States.

As this Court has recently reaffirmed, states have a broader power to regulate picketing grounded in economic motivation then they do to regulate politically motivated picketing. NAACP v. Claiborne Hardware Co., 458 U.S. 886,912-13 (1982). See: Roberts v. United States Jaycees, __U.S.__ 104 S.Ct. 3244, 3259 (1984) (O'Connor, J.;concurring) ("A group boycott or refusal to deal for political purposes may

be speech... though a similar boycott for purposes of maintianing a cartel is not").

The picketing here was without doubt political. It is therefore entitled to greater protection and the legislation seeking to curb speech/expression is subject to a more demanding test in order to be restricted. As argued above, the legislation has failed to satisfy the more demanding test required in order to survive a constitutionalchallenge.

CONCLUSION

WHEREFORE, for all and each of the above reasons set forth above, Respondent Finzer respectfully prays that this Honorable Court strike the offensive legislation, finding it unconstitutional and permit Respondent Finzer and the petitioners to engage in those activities from which they have thus far been precluded.

Respectfully submitted,

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RESPONDENT'S

BRIEF

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No. 86-803

In The

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL BOOS, J. MICHAEL WALLER AND
BRIDGET BROOKER
Petitioners,

v.

MARION S. BARRY, JR., MAURICE T. TURNER,
THE DISTRICT OF COLUMBIA AND FATHER R. DAVID FINZER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Distirct of Columbia Circuit

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TABLE OF CONTENTS

	Page
Constitutional Provisions and Statutes Involved	1
Statement of the Case	3
1. *The Legislative History*	3
2. *The Purposes Now Served by the Statute*	9
3. *The Decisions of the Courts Below*	12
Summary of Argument	14
Argument:	
I. *The Overriding Government Interest in Furthering National Foreign Policy Interests, and Specifically in protecting the Safety, Peace, and Dignity of Diplomats and Diplomatic Missions Here and Abroad, Establish the Constitutionality of Section 22-1115.*	16
A. Introduction	16
B. The Important Interests Furthered by § 22-1115	17
1. The international obligation of protecting the safety, peace and dignity of foreign missions.	17
2. The national interest in conducting foreign relations in an atmosphere free of hostility.	24
3. The interest in reciprocal protections for United States diplomats in other countries.	24
4. The international obligation to protect and maintain the inviolability of foreign missions.	26
5. Congress' reliance on the District government is consistent with these national interests.	27
C. Section 22-1115 Rests upon Compelling National Interests.	29

TABLE OF CONTENTS—Continued

Page

II. *The "Flag and Banner" portion of the statute is not vague nor overbroad; petitioners' vagueness and overbreadth claims are merely recastings of their arguments on the merits.* 34

III. *The Second Clause of § 22-1115 is crafted to honor the international obligation to protect foreign embassies; and is neither vague nor overbroad.* . 36

A. The meaning of the "congregation clause" as construed 36

B. The "congregation clause" is not vague . . . 39

IV. *The Labor Picketing Exemption in § 22-1116 does not Violate Petitioners' Rights to Equal Protection of the Laws* 43

Conclusion 46

TABLE OF AUTHORITIES

CASES:

Adderley v. Flordia, 385 U.S. 39 (1966) 32, 42

American Party of Texas v. White, 415 U.S. 767 (1974) 30

Anderson v. Celebrezze, 460 U.S. 780 (1983) 30

Bouie v. City of Columbia, 378 U.S. 347 (1964) 38

Buckley v. Valeo, 424 U.S. 11 (1976) 30

Cameron v. Johnson, 390 U.S. 611 (1968) 41

Carey v. Brown, 447 U.S. 455 (1980) 44

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) . . 42

City of Renton v. Playtime Theatres, Inc., 106 S. Ct. 925 (1986) 31

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 31

Cohen v. California, 403 U.S. 15 (1971) 42

TABLE OF AUTHORITIES—Continued

Page

Concerned Jewish Youth v. McGuire, 621 F.2d 471 (2d Cir. 1980), cert. denied, 450 U.S. 913 (1981) 28, 34

Cox v. Louisiana, 379 U.S. 559 (1965) 29, 32, 41

Dimond v. District of Columbia, 253 U.S. App. D.C. 111, 792 F.2d 179 (1986) 38

Edwards v. South Carolina, 372 U.S. 229 (1963) 31, 41

Ex Parte Quirin, 317 U.S. 1 (1942) 18

Financial General Bankshares, Inc. v. Metzger, 220 U.S. App. D.C. 219, 680 F.2d 768 (1982) 38

Frend v. United States. 69 App. D.C. 281, 100 F.2d 691 (1938), *cert. denied*, 306 U.S. 640 (1939) 4, 12

Grayned v. City of Rockford, 408 U.S. 104 (1972) . . . 32, 39, 42

Greer v. Spock, 424 U.S. 828 (1976) 29, 32

Hoffman v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 40

Hunter v. District of Columbia, 47 App. D.C. 406 (1918) 37

Jewish Defense League v. Washington, 347 F. Supp. 1300 (D.D.C. 1972) 45

Kinoy v. District of Columbia, 130 U.S. App. D.C. 290, 400 F.2d 761 (1968) 37

Kolendar v. Lawson, 461 U.S. 352 (1983) 39, 40

Munro v. Socialist Workers Party, 107 S. Ct. 533 (1986) 30

Niemotko v. Maryland, 340 U.S. 268 (1951) 31

Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983) 29, 31

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) 31, 44, 45

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 30

TABLE OF AUTHORITIES—Continued

	Page
Schneider v. Smith, 390 U.S. 17 (1968)	40
Smith v. Goguen, 415 U.S. 566 (1974)	41
Thomas v. Barry, 234 U.S. App. D.C. 378, 729 F.2d 1469 (1984)	38
U.S. Civil Service Commission v. National Assn. of Letter Carriers, 413 U.S. 548 (1973)	30
U.S. Postal Service v. Greenburgh Civic Ass'ns, 453 U.S. 114 (1981)	18
United States v. Arjona, 120 U.S. 479 (1887)	18
United States v. Grace, 461 U.S. 171 (1983)	17, 29, 31, 34
United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820)	18
United States v. Travers, 98 D. Wash. L. R. 1505 (D.C. Ct. Gen. Sess., Aug. 26, 1970)	37
Washington Mobilization Committee v. Cullinane, 184 U.S. App. D.C. 215, 226, 566 F.2d 107 (1977)	43
Widmar v. Vincent, 454 U.S. 263 (1981)	17, 29
Young v. American Mini Theatres, 427 U.S. 50 (1976)	31
Zaimi v. United States, 155 U.S. App. D.C. 66 476 F.2d 511, 513 (1973)	36, 37

CONSTITUTION, TREATIES, STATUTES:

Art. I, § 8, cl. 10	3, 18, 32, 38
Art. I, § 8, cl. 18	18
D.C. Code § 22-1115	*passim*
D.C. Code § 22-1116	3, 43, 44
D.C. Code § 22-1121 (2)	43
18 U.S.C. § 112	33
18 U.S.C. § 112(b)	28
18 U.S.C. § 953	24, 31

TABLE OF AUTHORITIES—Continued

	Page
Act of Jan. 30, 1799, 1 Stat. 613, now codified at 18 U.S.C. § 953	24
Pub. L. 91-358, § 155(a), 84 Stat. 473 (1970)	4
Pub. L. 93-198, 87 Stat. 774 (Dec. 24, 1973)	28
Pub. L. 99-399, §1302, 100 Stat. 853 (Aug. 27, 1986)	27
S.J. Res. No. 191, 52 Stat. 30 (1938)	3, 44
Vienna Convention on Diplomatic Relations, 23 U.S.T. 3229, T.I.A.S. No. 7502 (1972)	
Art. 22	15, 17, 21, 22, 26, 29
Art. 30	21
Art. 45	27
Art. 47	25, 26

CONGRESSIONAL MATERIALS:

81 Cong. Rec. (1937)	*passim*
111 Cong. Rec. (1965)	33
S. Rep. No. 1072, 75th Cong. lst Sess. (July 22, 1937)	4, 7
H. Rep. No. 1516, 75th Cong. lst Sess. (Aug. 12, 1937)	4, 7
Hearings before the Senate Foreign Relations Committee on S. Exec. Rep. H, Vienna Convention on Diplomatic Relations, (July 16, 1965)	23
Hearings on Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations for 1988 before the House of Representatives Committee on Appropriations, 100 Cong. lst Sess. 402-408 (April 1, 1987)	28
History of Laws Prohibiting Correspondence with a Foreign Government, S. Doc. 696, 64th Cong. 2d Sess. 3-9 (1917)	24

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS: Page

E. Denza, *Diplomatic Relations: Commentary on the Vienna Convention on Diplomatic Relations*, 83-84 (1976); 23, 27

Diplomatic Intercourse and Immunity, II Yearbook of the International Law Commission 129-172 (1956) . 20

Diplomatic Privileges and Immunities: Government Report on the Vienna Convention on Diplomatic Relations, Cmnd 9497 (1985), *reprinted in The British Yearbook of International Law*, 446 (1985) 33

T. Emerson, *The System of Freedom of Expression*, 358 (1970) 23

2 M. Farrand, *The Records of the Federal Convention of 1787*, 614-615 (Rev. ed. 1937) 18

The Federalist: No. 81 (Hamilton), at 487 (C. Rossiter ed. 1961) 19

Harvard Research in International Law: Draft Convention on Diplomatic Privileges and Immunities, Art 3(2), 26 Am. J. Int'l L. 50-51 (1932 Supp.) . 20

G. Hunt and J. Scott, *The Debates in the Federal Convention of 1787* (1920), *reprinted in Documents Concerning Formation of the Union*, H. Doc. No. 398, 69th Cong. 1st Sess. 109 (1927) 18

International Law Commission: Draft Convention on Diplomatic Immunities and Intercourse II Yearbook of the International Law Commission 95, 105 (1958) 22, 26

2 C. Hyde, *International Law Digest*, 1249 (1945) . . . 19

Kerley, *Some Aspects of the Vienna Conference on* Diplomatic Intercourse and Immunities, 56 Am. J. In'tl L., 102-03 (1962) 27

1 H. Lauterpacht, *Oppenheim on International Law* § 386 at 707 (7th Ed. 1948) 19

Minutes of the 396th Meeting of the International Law Commission (Diplomatic Intercourse and Immunities), I Yearbook of the Int'l Law Comm'n 1957 at 63 . . . 22

TABLE OF AUTHORITIES—Continued

Page

6 J. Moore, *International Law Digest*, 813 (1906) 19

L. Preuss, Protection of Foreign Diplomatic and Consular Premises Against Picketing, 31 Am. J. Int'l L. 705 (1937) 23

Restatement of Foreign Relations Law (Revised), § 721, comment d. (Tent. Draft No. 4, April 1, 1983) 23

B. Sen, *A Diplomat's Handbook of Law and Practice*, 93-95 97-98 (1979) 23

E. Stowell, *The Joint Resolution Prohibiting the Picketing of Diplomatic and Consular Premises in the District of Columbia*, 32 Am. J. Int'l L. 344 (1938) 23

Report of the U.S. Delegation to the U.N. Conference on Diplomatic Intercourse and Immunities, 13, 16 (July 13, 1961) 22, 27

U.S. Brief in Vanna Om Strinko v. United States, D.C. App. No. 85-1330, filed June 6, 1986 37

7 M. Whiteman, *Digest of International Law*, 386-388 (1970) 33

In The

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-803

MICHAEL BOOS, J. MICHAEL WALLER AND
BRIDGET BROOKER
Petitioners,

v.

MARION S. BARRY, JR., MAURICE T. TURNER,
THE DISTRICT OF COLUMBIA AND FATHER R. DAVID FINZER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Distirct of Columbia Circuit

BRIEF FOR RESPONDENTS

CONSTITUTIOANL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Art. I, § 8, cl. 10:

> The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations; . . .

U.S. Const., Amend. I:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

D.C. Code § 22-1115 (1981). Interference with foreign diplomatic and consular offices, officers and property—Prohibited.

> It shall be unlawful to display any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party, or organization, or any officer or officers thereof, or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government, party, or organization, or to intimidate, coerce, harass, or bring into public disrepute any officer or officers or diplomatic or consular representatives of any foreign government, or to interfere with the free and safe pursuit of the duties of any diplomatic or consular representatives of any foreign government, within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, or for other official purposes, except by, and in accordance with, a permit issued by the Chief of Police of the said District; or to congregate within 500 feet of any such building or premises, and refuse to disperse after having been ordered so to do by the police authorities of the said District

D.C. Code § 22-1116 (1981). Same—Penalties; exception.

> The Superior Court of the District of Columbia shall have jurisdiction of offenses committed in violation of § 22-1115, and any person convicted of violating any of the provisions of said section shall be punished by a fine not exceeding $100 or by imprisonment not exceeding 60 days, or both; Provided, however, that nothing contained in said section shall be construed to prohibit picketing, as a result of bona fide labor disputes regarding the alteration, repair, or construction of either buildings or premises occupied, for business purposes, wholly or in part, by representatives of foreign governments.

STATEMENT OF THE CASE

This case involves the facial validity of D.C. Code § § 22-1115 and 22-1116 (1981), which are challenged on First Amendment grounds. A divided panel of the D.C. Circuit upheld these provisions and affirmed in relevant portions the district court's grant of summary of judgment for the respondents. (App. 54a, 105a-110a)[1]

These provisions make certain forms of political demonstrations respecting a foreign government unlawful in the District of Columbia when conducted within 500 feet of the foreign government's embassy or other property used for official purposes. The prohibitions are in § 22-1115, which has two parts: the first, or "flag and banner" clause, prohibits picketing against a foreign government by making it unlawful to display within 500 feet of an embassy or similar building "any flag, banner, placard, or device * * * designed * * * to intimidate, coerce, or bring into public odium any foreign government * * * or to bring into public disrepute" either the "political, social, or economic acts, views, or purpose of any foreign government" or any foreign diplomat or official. The second clause prohibits congregations of three or more people within 500 feet of an embassy.

Petitioners filed this action against the District of Columbia and its Mayor and Chief of Police to enjoin arrests and prosecutions under 22-1115. Petitioners wish to engage in demonstrations prohibited by § 22-1115 in front of the Soviet and Nicaraguan embassies. (J.A. 4-5, 7-8, 10-11). They want to carry signs which say "STOP THE KILLING" in front of the Nicaraguan embassy, and "RELEASE SAKHAROV" or "SOLIDARITY" in front of the Soviet Union's embassy, and to congregate with others in their demonstrations. *(Id.)* They intend that their demonstrations will be peaceful. *(Id.)*

1. The Legislative History.

Congress enacted § § 22-1115 and 22-1116 in 1938,[2] pursuant to its power under Art. I, § 8, cl. 10 of the Constitu-

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[1] "App." means the Appendix to the Petition for a Writ of Certiorari. "J.A." means the Joint Appendix.

[2] S.J. Res. No. 191, 52 Stat. 30 (1938).

tion, "To define and punish * * * Offenses against the Law of Nations." (App. 8a)[3] The statute has not been amended in the nearly 50 years since its enactment, except to redesignate the court with jurisdiction to try offenses under § 22-1115 when Congress reorganized the District of Columbia courts.[4]

The legislative history indicates that the statute has several related purposes. Congress intended to implement the obligations of the United States under customary international law that require protecting the safety, and the peace and dignity of foreign diplomatic missions and diplomats. 81 Cong. Rec. 8586-87. It wished to protect United States citizens living abroad (especially in China) who had taken refuge in U.S. Missions and were particularly vulnerable to mobs that might be inflamed by insults to their diplomats in this country. *Id.* at 8484-85, 8587. Congress wanted to obtain similar protections for our embassies and diplomats in other countries, and it believed existing law was inadequate to deal with mass picketing and demonstrations that were then occurring at several embassies in the District of Columbia. S. Rep. No. 1072, 75th Cong. lst Sess. 1-2 (July 22, 1937); H. Rep. No. 1516, 75th Cong. lst Sess. 1 (Aug. 12, 1937; 81 Cong. Rec. 8484-85, 8587.

Senator Pittman, Chairman of the Foreign Relations Committee and draftsman of Senate Joint Resolution 191, relied upon the duty of a receiving state to protect foreign missions and ambassadors as a principal basis for the legislation. He said:

> Mr. President, the object of the pending joint resolution is quite plain from the language used in it. It is intended to protect foreign diplomats in our

[3] See, Frend v. United States, 69 App. D.C. 281, 282, 100 F.2d 691, 692 (1938), cert. denied, 306 U.S. 640 (1939).

[4] E.g., Pub. L. 91-358, § 155(a), 84 Stat. 473, 570 (1970) (designating Superior Court of the District of Columbia in place of the Court of General Sessions, which was abolished).

> country in their embassies and legations from harassment and annoyance from acts which would bring into odium the countries they represent, which would bring into disrepute their officers, and which would nullify the inviolability of ambassadors and ministers as they are protected in every country throughout the world.
>
> I believe that since the beginning of government the inviolability of ambassadors and ministers has been universally recognized in all civilized countries. Even in times of vicious wars special ambassadors from one of the hostile countries to the other have gone without guards, realizing that the honor of the country to which they were going was sufficient to protect their lives and to protect them in the performance of their duties. If this were not so, intercourse between governments would be practically impossible. The peace of the world largely depends upon the treatment by governments of all foreign ambassadors and ministers within their borders. I think it is more important to us than to any other government in the world that at this time we maintain this policy.
>
> * * *
>
> That is the universal law of nations, and has been from the very beginning of governments. As I have said, we cannot treat them as we treat other foreigners within our borders who do not come here under special privileges. Other foreigners are subject to our laws. Such a condition is impossible in the case of an ambassador or a minister. They represent a government. Their embassies and their legations are part of the government they represent. To all intents and purposes, and under legal construction, their embassies, their chancelleries, and their homes are part of a foreign territory.

81 Cong. Rec. at 8586-87. Senator Pittman felt it necessary to ban all embassy picketing, because "[t]he very object of picketing is * * * the desire to bring into odium the government whose embassy or legation is being picketed. Otherwise, the picketers do not accomplish anything." *Id.* at 8589. Although some picketing of embassies that had occurred in the months that preceded enactment of the joint resolution had involved large numbers of pickets (85 to 150),[5] Senator Pittman said it was necessary to ban even small assemblies.

> . . . [I]n some cases there has been no great assemblage. There were only five or six persons. They were not interfering with the traffic of the street. They were not using any language at all, but they carried placards which were critical of the governments represented by the embassies. Back and forward they walked, all day long. That is not illegal under any law of which I know. I am trying to have it made illegal, provided such devices and banners carry upon them a reflection on the government represented by the ambassador, and if they bring that government into odium, no matter whether or not there is now a law against it. It is not illegal picketing in any sense of the word, but it is calculated to frighten those within the building. It has frightened them, and such things should not be permitted. I do not believe we should allow the picketing of a foreign ambassador or a foreign minister or any picketing so close to him that it will cause fright.

Id. at 8592. The issue of the law's constitutionality was debated, and Senator Pittman argued strenuously that there was no constitutional right to do what was regulated by the statute:

> —to make an offensive demonstration in front of an embassy or in front of a legation, the residence of a diplomat, who is our guest here, who depends on us wholly for his protection not only against murder,

[5] *Id.* at 8586 (Reprinted Statement of Inspector Kelly of the Metropolitan Police Department).

> not only against insult, but against any character of annoyance or interference that will bring the hatred of the people of his country against our people.

Id. at 8589.

Another principal object of the legislation was to obtain reciprocal protections for the large number of United States missions and consulates in other countries. The committee reports state:

> The object of the resolution is to offer the same protection to foreign diplomatic and consular officers and their embassies, legations, and consulates in the District of Columbia that we are urging foreign governments to grant to our diplomatic and consular officers and our embassies, legations, and consulates in their respective countries. Our citizens in foreign countries in the event of disturbances in such countries must rely in many cases upon the sanctuary universally granted in our embassies, legations, and consulates. Our immediate and pressing obligation at the present time is to protect our citizens in foreign countries or in portions of foreign countries where great disturbances exist. In many cases we cannot evacuate our citizens by reason of dangerous conditions and must attempt to safeguard them within our diplomatic and consular premises.

S. Rep. No. 1072, *supra* at 1-2; H. Rep. No. 1516, *supra* at 1. A letter from Secretary of State Cordell Hull to Senator Pittman indicated that enactment of the joint resolution was necessary "to allow governments to transact official business free from interruption which might flow from molestation of or interference with their representatives." S. Rep. No. 1072 *supra* at 2; H. Rep. No. 1516, *supra* at 1-2. Secretary Hull also said that enactment was needed to obtain reciprocal protections for the missions of the United States:

> The United States with its 338 diplomatic missions and consulates is, perhaps more than any other country, interested in obtaining for its represen-

tatives the protection which they must have if they are to function effectively.

If we are to obtain for our representatives in foreign countries that degree of protection to which they are entitled, we should be in a position to show a like consideration for representatives of other governments in this country. Unless we extend such reasonable protection to representatives of other governments, we cannot hope to receive protection for our representatives abroad.

It is extremely embarrassing to the Department to be reminded by representatives of foreign governments in the United States that their missions are being interfered with by individuals or groups, particularly when existing domestic law does not seem to cover the situations of which complaint is made. By the comity of nations, representatives of foreign governments in countries where law and order are supposed to prevail are entitled to freedom from any attempted intimidation or coercion.

I therefore trust that you may find no difficulty in procuring passage of the resolution.

Id.[6]

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[6] These views were reiterated by Secretary of State George P. Shultz in his June 30, 1987 letter to David Clarke, Chairman of the District of Columbia Council. Secretary Shultz stated:

> *The protection of foreign embassies is a matter of vital importance to me and to the Department of State. The Vienna Convention on Diplomatic Relations obligates the parties to protect the premises of diplomatic missions and to prevent any disturbance of the peace of the mission or the impairment of its dignity.* The United States Government takes these obligations seriously, and expects other governments to do the same. *Our experience has been that D.C. Code section 22-1115 has been an effective means of fulfilling these obligations.*
>
> *We must scrupulously honor our obligation to protect foreign diplomatic missions in order to ensure that United States missions abroad receive reciprocal treatment.* I am therefore deeply

[Footnote continued on next page]

Congress was especially concerned about protection of United States citizens in countries where a state of war existed, and about the inviolability of the mission. Japan had invaded China and U.S. citizens there had crowded into embassy or mission compounds and were protected only by a small number of marines. There were 500 U.S. citizens in the compound at Peiping, China; 700 in the compound at Tientsin; and 200 in Hankow. They could not be evacuated due to the hostilities, and Congress was concerned that armed mobs would be incited to overrun the compounds by insults to either Japan or China. 81 Cong. Rec. 8484-85, 8587.

A report to Congress from the Metropolitan Police Department indicated that there had been a large number of demonstrations at several embassies in the District of Columbia in the months that preceded consideration of the 1938 joint resolution. Several demonstrations were large; there were 150 arrests at one of them. The Department did not consider existing law adequate to deal with the demonstrations. 81 Cong. Rec. 8486.

2. The Purposes Now Served by the Statute.

The factual record in this case shows that § 22-1115 serves the same governmental interests today as those articulated in the legislative history 50 years ago. State Department, Secret Service, and Metropolitan Police Department officials

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[6] [Footnote continued from previous page]

> concerned about Bill 7-59, which would eliminate the existing "500 foot rule," thereby permitting demonstrations in close proximity to embassies. Such *a change, at the very time when we are urging other governments to increase security for our diplomats abroad, could place our diplomats at risk.* We therefore oppose any proposal that would reduce the 500 foot protected area.
>
> I hope that you and the other members of the Council will take into account these considerations and that you will not take any legislative action that could be perceived by other governments as a relaxation of our security standards. [emphasis supplied].

submitted affidavits stating that the 500 foot buffer zone established by §22-1115 is critical to both the protection of United States diplomats abroad and to foreign diplomats and foreign diplomatic buildings in Washington, D.C.

The Director of the Office of Foreign Missions of the Department of State, James E. Nolan, Jr., stated that continued enforcement of § 22-1115 is "essential to the foreign policy interests of the United States government and the effective operation of the Office of Foreign Missions." (J.A. 24) The policy of the United States abroad in protecting diplomatic missions and personnel is to "seek host government cooperation in establishing police-enforced demonstration proximity limits at maximum distances from American facilities." (J.A. 25) Most countries grant those requests, but in "countries where groups are permitted to demonstrate near American facilities, we have suffered the unfortunate consequences of personal injury and property damage." (J.A. 25) He said that "[t]he best way to support the secure operation of U.S. missions abroad is to provide effective security to foreign missions here." (J.A. 24-25) Reduction of security here would "subject U.S. personnel to a greater possibility of injury due to a reduction of security provided for them." (J.A. 25)

Deputy Assistant Secretary of State for Security, David Fields, stated that it is "important for the foreign policy interests of the United States to continue the protections" provided by § 22-1115. (J.A. 16) He said the statute is very important for meeting special international obligations to protect foreign diplomats and diplomatic premises and in obtaining reciprocal protections for United States diplomats in other countries. (J.A. 16-17, 18) He said that foreign governments base the level of protection they provide U.S. diplomats in their countries on the level of protection that their diplomats receive here. *(Id.)* He cited two examples of demonstrations that had erupted into violence and said that the 500-foot buffer was necessary in such instances to protect and to maintain the inviolability of diplomatic premises. (J.A. 17-18) In describing the importance of the buffer, he said:

> Another example of this problem occurred recently in connection with a demonstration near the Soviet Embassy here by a group of Afghans protesting the Soviet invasion of Afghanistan. The demonstrators broke through police lines, but due to the 500-foot distance separating them from the Embassy premises, police were able to re-establish control, making a number of arrests in the process, before the demonstrators could reach the building. Had the distance separating the demonstrators from the Embassy been less, the results probably would have been quite different, and property damage and personal injury to the embassy and its occupants might well have resulted with potentially serious consequences for U.S. foreign relations and the security of U.S. personnel overseas. (J.A. 18)

Secret Service Special Agent Thomas D. Quinn and Deputy Chief John C. Conner of the Metropolitan Police Department, both in charge of providing security to foreign missions in the District of Columbia, attested to the special problems of providing security due to the fact that their personnel may not enter the premises of foreign diplomatic buildings unless expressly invited. (J.A. 20-22,27) This contrasts sharply with security arrangements at domestically-controlled buildings such as the White House. At the White House, for example, security personnel are constantly present and have a security network consisting of a central command center, manned perimeter posts, and sophisticated surveillance equipment, enabling continuous monitoring of the area between the building and the fence which surrounds it. Special Agent Quinn stated:

> * * * [I]n contrast to the White House and other official buildings of the United States, Secret Service personnel are prohibited by international law and

> comity from entering onto the premises of a foreign embassy, legation, or consulate except with the expressed prior approval of the foreign government. Consequently, at such locations, the Secret Service has no centrally located defensive command center, has a minimal amount of intrusion detection equipment at its disposal, and, perhaps most important, has no secondary or fall-back defensive position which would otherwise be available if the Secret Service were permitted to position personnel inside the protected premises. (J.A. 21-22)

3. **The decisions of the courts below.**

The district court granted summary judgment to respondents based upon *Frend v. United States*, 69 App. D.C. 281, 100 F.2d 691 (1938), *cert. denied*, 306 U.S. 640 (1939), which the court viewed as establishing the law of the circuit. The court of appeals did not consider itself bound by *Frend* due primarily to developments in the case law since that case was decided. The court of appeals therefore took a fresh look at the statute's constitutionality and, upon lengthy analysis, affirmed.

In deciding whether regulation of demonstrations provided in § 22-1115 was constitutional, the court of appeals considered the "core" of the case to be "the relationship between the United States' national interests and international obligations and the First Amendment's guarantee of free speech" and whether § 22-1115 achieves a "permissible accommodation between the claims of these profound constitutional values." (App. 8a)

The court found a compelling governmental interest in prohibiting demonstrations against foreign governments at their embassies. That compelling interest arises from the interest of the United States in protecting its embassies and diplomats abroad, and from its obligations under international law to protect foreign missions and diplomats from intimidation, potential violence, and assaults on the dignity and peace of the mission.

The court noted that the right to demonstrate may be made to depend on the place of the protest, citing decisions of this Court upholding prohibitions of demonstrations at courthouses and prisons. The court wrote that, while the First Amendment does not permit the shielding of U.S. government officials from protests, "[f]oreign ambassadors, in contrast, have no similar obligation to be accessible to public attack, and our polity does not have the same interest in ensuring that they are." (App. 23a) The court also recognized, in light of the factual record outlined above, that reduced protection to foreign embassies would compound the present risks to American diplomats overseas. (App. 23a-24a) However, the court considered the most fundamental consideration supporting limitations on hostile demonstrations to be the government's obligations under international law, including particularly the 1961 Vienna Convention. (App. 24a) These considerations distinguish demonstrations in front of a foreign embassy from those in front of the White House or other United States government buildings. (App. 24a)

The court found § 22-1115 to be a reasonable accommodation between these compelling governmental interests, on the one hand, and the First Amendment, on the other, because the section "imposes only a very minor geographic limitation on speech" that could not be served by a statute "that had any significantly smaller impact on speech." (App. 24a) The court stated:

> [T]he statute that Congress has crafted proscribes an opposition demonstration only within a narrowly defined locus. Plaintiffs are free under section 22-1115 to hold an anti-Soviet demonstration anywhere in the city but within 500 feet of the Soviet Embassy. Appellants presumably feel that the embassy location would generate heightened visibility and best help them succeed in getting their message across. But the first amendment does not guarantee an optimal setting for the speech; there

> is no right to the backdrop most interesting to press photographers or television cameramen. See Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981); Adderley v. Florida, 385 U.S. [39] at 47-48; White House Vigil for the ERA Committee v. Clark, 746 F.2d [1518] at 1520, 1538 (D.C. Cir. 1984). Inevitably, many of the most desirable places to demonstrate will be buildings and areas that for other reasons require special protective measures. We think Congress has met an unusually difficult problem with a balanced attempt to restrict no more speech than necessary.

(App. 24a)(footnote omitted).

SUMMARY OF ARGUMENT

Compelling national interests support the limited geographic restrictions, imposed by D.C. Code § 22-1115 (1981), on demonstrations against the policies of foreign governments at their embassies and other official property in the District of Columbia. The restrictions on hostile picketing, and on congregations of demonstrators that threaten the security or the peace of foreign embassies are slight, because they are limited to an area within 500 feet of the foreign government's property. The restrictions are no broader then necessary to serve the compelling national interests that support the statute.

The compelling nature of the interests served is fully demonstrated in the legislative history of the statute, in the strong statements of Secretary of State George P. Shultz and former Secretary of State Cordell Hull, and in the affidavits of high-level foreign policy and security experts in the Department of State and the Secret Service. The statute permits the United States to meet its international obligation to protect foreign diplomats and diplomatic premises. The obligation of protection, firmly established in customary international law and in the multi-lateral Vienna Convention on Diplomatic Relations, is a "special duty" to "protect the

premises of the [foreign] mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity" Art. 22(2).

Foreign policy experts stated in their affidavits that performance of this international obligation to protect the safety, peace, and dignity of foreign diplomatic missions is essential to the conduct of foreign relations. The statute permits foreign relations to be conducted free of strains that would exist in an atmosphere of constant demonstrations of hostility by American citizens literally at the door steps of foreign embassies. The statute permits police and Secret Service personnel to provide physical protection by giving them a defensive zone between demonstrators and embassy premises. Security personnel can not perform this special duty imposed by international law without such a zone, because they cannot enter the foreign diplomatic premises to take up defensive positions. International law makes foreign diplomatic premises inviolate even to host country security personnel.

The statute promotes similar reciprocal protections for American diplomats and diplomatic premises in other countries. Secretary Shultz, foreign policy experts, and security experts have all shown that a reduction in the protections provided by § 22-1115 would have the likely consequence of reducing the security of United States' diplomatic premises abroad. It would place many of our representatives, already at serious risk, at even greater risk.

The statute is narrowly tailored. The prohibitions imposed are no broader than essential to serve the compelling interests that support the statute. Section 22-1115 is neither vague nor overbroad. The first clause of the section is easily understood by ordinary citizens and enforcement officials; it prohibits picketing — the carrying of some type of sign in protest against a foreign government or its officials within 500 feet of embassy premises. The purpose of the clause is to protect the dignity of foreign governments.

The meaning of the second clause is also clear. Its purpose is to protect the safety and peace of foreign missions. The clause permits the police to order dispersal of congregations of demonstrators that threaten the safety or peace of the mission. The clause requires enforcement officers to exercise limited judgment in the narrow areas of whether the safety or peace of the mission is threatened by an assemblage that has already gathered. Such judgments are made by police officers in many other contexts including domestic disturbances, crowd control at other places, and in providing security to domestic buildings.

The labor-picketing exemption does not deny petitioners equal protection of the laws. There is a rational basis for distinguishing between labor picketing and other picketing against foreign governments. The prohibited picketing relates to demonstrations against the international or internal policies of foreign governments. By contrast, the labor-picketing exemption requires that there be a *bona fide* labor dispute at the site picketed and concerns a very narrow range of activities by the foreign government in this country that directly impacts on the economic interests of the picketers. Thus, Congress could reasonably determine that the compelling national interests that support a ban on picketing critical of a foreign government's internal and international policies do not also support a labor-picketing ban. There is no denial of equal protection.

ARGUMENT

I. The Overriding Government Interest in Furthering National Foreign Policy Interests, and Specifically in Protecting the Safety, Peace, and Dignity of Diolomats and Diplomatic Missions Here and Abroad, Establish the Constitutionality of Section 22-1115.

A. Introduction.

The legislative history of § 22-1115, the strong statements of two Secretaries of State, and the affidavits of high-level State Department and Treasury officials responsible for protecting foreign diplomatic missions in the District of

Columbia and our missions abroad, all attest to the critical importance of § 22-1115 to the United States' ability to conduct foreign affairs. The United States — indeed, any nation — cannot credibly conduct foreign relations unless it meets its most essential obligation to other nations, which is to protect their diplomatic representatives and missions in this country. Section 22-1115 is necessary for that essential function, and it implements the multilateral treaty obligation, imposed by the Vienna Convention on Diplomatic Relations,[7] to protect the premises of diplomatic missions and "to prevent any disturbance of the peace of the mission or impairment of its dignity."[8]

In light of the functions served by § 22-1115, Congress has reached a permissible balance between important national interests and the First Amendment's guarantee of free speech. The restrictions on speech imposed by § 22-1115 are no greater than necessary to support those vital interests. These interests support the limited ban on picketing and other expressive activities hostile to a foreign government within 500 feet of a foreign embassy. The statute is constitutional, because it is "necessary to achieve a compelling state interest and . . . is narrowly drawn to achieve that end." *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981); *United States v. Grace*, 461 U.S. 171, 177 (1983).

B. The Important Interests Furthered by § 22-1115.

1. *The international obligation of protecting foreign diplomatic missions.* The legislative history of § 22-1115 shows that it was enacted to honor the international obligation to protect the safety, peace, and dignity of foreign government missions in the District of Columbia. Congress determined that to honor its international obligations, it is necessary to prohibit demonstrations hostile to foreign governments at their embassies.

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[7] TIAS No. 7502, 23 U.S.T. 3229 (1972).

[8] Article 22(2); Letter of Secretary of State Shultz, *supra* note 6.

(a). The Constitution commits to Congress the authority to define international law and international obligations and to legislate appropriate means to implement them. The power of Congress under Art. I, § 8, cl. 10 is broad. It is a power both to "punish" offenses and to "define" international obligations under the "Law of Nations."[9] In addition, Art. I, § 8, cl. 18, the "necessary and proper" clause, gives Congress the power to make all laws that are appropriate to implement its power to punish and define offenses against the law of nations. *United States v. Arjona*, 120 U.S. 479, 483 (1887); *U.S. Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 133 (1981).

(b). When § 22-1115 was enacted, there was a firm basis in customary international law for concluding that hostile demonstrations should be prohibited out of respect for the

[9] The text of the Clause plainly states the breadth of the power. The textual commitment is the power both to "define" and to "punish . . . Offences against the Law of Nations."

The debates at the Constitutional Convention make clear that Congress was granted the power to define the law of nations as well as to create punishments for violations. Early drafts of the Clause would have given Congress only the power to " 'punish' offences against the law of nations." Gouverneur Morris objected to that phrasing, and proposed the language that was adopted, "so as to let these be *definable* as well as punishable." His reasoning was that "[t]he word *define* is proper when applied to *offences* in this case; the law of (nations) being often too vague and deficient to be a rule." 2 M. Farrand, *The Records of the Federal Convention of 1787*, 614-615 (Rev. ed. 1937) (emphasis in original); *see also* G. Hunt and J. Scott, *The Debates in the Federal Convention of 1787* (1920), *reprinted in Documents Concerning Formation of the Union*, H. Doc. No. 398, 69th Cong. lst Sess. 109, 723 (1927). In *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159 (1820), the Court said:

> "Offences . . . against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations. In respect to offenses against the law of nations, there is a peculiar fitness in giving the power to define as well as to punish . . .."

The Clause gives Congress authority to "codify" a "branch of international law or to mark its precise boundaries." *Cf. Ex Parte Quirin*, 317 U.S. 1, 29 (1942).

dignity of foreign governments. "Diplomatic envoys" are "as sacrosanct as heads of States" and "must be afforded special protections . . .." 1 H. Lauterpacht, *Oppenheim on International Law* § 386 at 707 (7th Ed. 1948).[10] The special responsibility that host states have to ensure that foreign missions and personnel in them are free from threats of violence and intimidation was "firmly entrenched in the Law of Nations." 2 C. Hyde, *International Law Digest*, 1249 (1945).

The duty of "especial respect and protection" of foreign ministers and consuls was recognized as a national obligation.[11]

[10] It was out of respect for foreign sovereigns that this Court was given original jurisdiction of cases affecting ambassadors and public ministers. *The Federalist: No. 81 (Hamilton)*, at 487 (C. Rossiter ed. 1961):

> Public ministers of every class are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory in the nation.

[11] President Fillmore stated in his annual message to Congress, December 2, 1851:

> Ministers and consuls of foreign nations are the means and agents of communication between us and those nations, and it is of the utmost importance that while residing in the country they should feel a perfect security so long as they faithfully discharge their respective duties and are guilty of no violation of our laws. This is the admitted law of nations and no country has a deeper interest in maintaining it than the United States. . . . What is due to our own public functionaries residing in foreign nations is exactly the measure of what is due to the functionaries of other governments residing here. As in war the bearers of flags of truce are sacred, or else wars would be interminable, so in peace ambassadors, public ministers, and consuls, charged with friendly national intercourse, are objects of especial respect and protection, each according to the rights belonging to his rank and station.

6 J. Moore, *International Law Digest*, 813 (1906).

A few years before § 22-1115 was enacted, a research group at Harvard University formulated a draft convention on diplomatic privileges and immunities based upon customary principles of international law, and it set out the duty of a receiving state to protect "the peace and dignity of the mission" in succinct terms:

> A receiving state shall protect the premises occupied or used by a mission, or occupied by a member of a mission, against any invasion or other act tending to disturb the peace or dignity of the mission or of the member of a mission . . ..

Harvard Research in International Law: Draft Convention on Diplomatic Privileges and Immunities, Art. 3(2), 26 Am. J. Int'l L. 50-51 (1932 Supp.).[12] The comment to this article sets out the customary practice which it codified:

> . . . . [T]here is a special duty of protecting the premises of a mission against certain acts threatened . . . [and which] manifestly will be increased in time of political disturbance, or if violence against the premises of the mission is threatened. Protection against invasion of the premises of a mission or of a member of a mission means protection against any attempt to enter the premises against the will of the chief or other members of the mission. *The duty, however, goes further than that. The receiving state is under a duty to protect the premises against any acts tending to interfere with the enjoyment or possession of such premises . . . The special duty of protection of premises would include protection against crowds or mobs collected in the vicinity of the premises for the purpose of expressing abuse, contempt or even disapprobation of the sending state or of its mission, or of the*

[12] This draft convention was later one of the influential documents in the work which preceded the drafting of the Vienna Convention on Diplomatic Relations. *See generally, Diplomatic Intercourse and Immunity,* II Yearbook of the International Law Commission, 129-72 (1956).

> *members of a mission. A similar duty would seem to exist to protect such premises against so-called "picketing," this being an act tending to disturb the peace and dignity of the mission.*

Id. at 56-57 (emphasis supplied).

(iii). The Vienna Convention on Diplomatic Relations provides that a host state has an obligation to protect diplomatic missions and residences "against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity." Articles 22 and 30 of the Convention provide:

Article 22

> 1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
>
> 2. *The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.*
>
> 3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Article 30

> 1. *The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.*

(Emphasis supplied). This multi-lateral treaty was entered into force with respect to the United States on December 13, 1972. 23 U.S.T. 3227 (1972).

Articles 22 and 30 were adopted without change from the draft prepared by the International Law Commission and

"accord generally with accepted principles of international law and practice." *Report of the U.S. Delegation to the U.N. Conference on Diplomatic Intercourse and Immunities*, 13, 16 (July 13, 1961). The debates and discussions of the Law Revision Commission show that the draftsmen of the Convention looked upon the "special duty" of protection imposed on a receiving state by Article 22(2) to be very important and that this special duty included a duty to prevent "any detraction from the dignity of a mission."[13] The International Law Commission's comment on Article 22(2) states that the provision places a receiving "State . . . under a special duty to take all appropriate steps . . . to prevent any disturbance of the peace of the mission or impairment of its dignity." II Yearbook of the International Law Commission 95 (1958).

In its analysis of the Convention presented to the Senate Foreign Relations Committee, the State Department indicated that Article 22 "does not . . . alter present law or practice of the United States Government." It stated that

[13] The minutes of the Law Revision Commission show that what became Article 22 in the Convention was discussed and/or debated at five Commission meetings (nos. 394, 395, 396, 397, and 455). The most relevant discussion to this case was at the 396th meeting when the present language of Article 22(2) was adopted, providing that "[t]he receiving State is under a special duty to take" appropriate steps to protect the premises, etc.

The amendment was offered by Sir Gerald Fitzmaurice of Britain who explained that it should be made "clear" that "the State's duty to protect the premises of foreign missions came in a special category." Gilberto Amado of Brazil supported the amendment, because "he attached great importance to the principle enunciated in the last part of the paragraph, that *the receiving State must prevent any detraction from the dignity of a mission.*" He noted that the amendment *"emphasizes the special nature of the State's duty in that connexion (sic)."* Four other delegates supported the amendment noting that there is a "duty" of "special vigilance" and many countries provide enhanced penalties for injuries inflicted on diplomats. The amendment passed by a 16-to-1 vote with 2 abstentions. *Minutes of the 396th Meeting of the International Law Revision Commission*, I Yearbook of the International Law Commission 63 (1957) (emphasis added).

the "duty [codified in Article 22] of protecting the premises of a diplomatic mission against intrusion, damage, and disturbance of the peace is reflected in Section 22-1115 . . . which makes it a criminal offense under certain conditions to picket or congregate within 500 feet of a diplomatic mission." *Hearings before the Senate Foreign Relations Committee on S. Exec. Rep. H, Vienna Convention on Diplomatic Relations*, 35, 49 (July 6, 1965). The State Department stated that Article 30 (Inviolability of Residence) is an amplification of Article 22 and is implemented by the same provisions. *Id.*

(iv). Scholarly comment offers strong support for the way that Congress has chosen to honor this international obligation. "[N]ational foreign affairs interests weigh heavily on the balance" of "private right against public need" so that "Congress may prohibit picketing near foreign embassies." *Restatement of Foreign Relations Law (Revised)*, § 721, comment d. (Tent. Draft No. 4, April 1, 1983). Indeed, even so strong a supporter of the First Amendment as professor Emerson has written "[t]he restriction [on demonstrations established by § 22-1115] would seem justifiable, but only on the theory that the embassy was in effect foreign territory and hence outside the American system of free expression." T. Emerson, *The System of Freedom of Expression*, 358 (1970). *See also*, E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 80 (1976) ("The high duty to protect embassy premises is also reflected in modern legislation in many countries," discussing D.C. Code § 22-1115); B. Sen, *A Diplomat's Handbook of Law and Practice*, 93-95 97-98 (1979). ("The government should prescribe a certain area around the mission premises in which such demonstrations will not be permitted." And discussion of § 22-1115).[14]

[14] And comment on § 22-1115 was strongly supportive of it, both while Congress considered it and following enactment, as representing an essential duty of the United States as a host state to protect foreign missions. L. Preuss, *Protection of Foreign Diplomatic and Consular Premises Against Picketing*, 31 Am. J. Int'l L. 705 (1937); E. Stowell, *The Joint Resolution Prohibiting the Picketing of Diplomatic and Consular Premises in the District of Columbia*, 32 Am. J. Int'l L. 344 (1938).

Thus, there is a strong basis in international law for Congress to find that the United States has an obligation to protect "the peace and dignity" of foreign missions and that prohibiting hostile demonstrations is a necessary and proper means of meeting that obligation.

2. *The national interest in conducting foreign relations in an atmosphere free of hostility.* D.C. Code § 22-1115 serves the important national interest of protecting the ability of the United States to conduct foreign affairs in an atmosphere that does not include demonstrations of hostility by United States citizens at the doors of foreign embassies, which could otherwise occur frequently. Senator Pittman expressed the view that foreign diplomats should be spared the fear and harassment caused by such demonstrations. 81 Cong. Rec. at 8586-87, 8589, 8592. Common sense tells us that a barrage of hostility by Americans at foreign embassies, such as calling foreign emissaries "killers," as petitioners seek to do, could strain relations with foreign governments, many of which are not particularly known for tolerance. Certainly, Congress can protect this important national interest.

For nearly 200 years, the interest in conducting foreign affairs without interference from private citizens has been recognized by Congress which has made unlawful private communications by Americans with foreign governments, when those communications are not authorized and concern matters of diplomatic interest. Act of Jan. 30, 1799, 1 Stat. 613, now codified at 18 U.S.C. § 953.[15]

3. *The interest in reciprocal protection for United States diplomats in other countries.* The legislative history of § 22-1115 indicates that one of the law's purposes is to secure

[15] Congress believed that foreign affairs should be conducted only by authorized representatives of the President or State Department; it enacted the law to prevent subversion of diplomatic efforts by private citizens. *See History of Laws Prohibiting Correspondence with a Foreign Government*, S. Doc. 696, 64th Cong. 2d Sess. 3-9 (1917) (discussing legislative history of this law, known as the Logan Act).

protections for American diplomats and citizens in other countries. Senator Pittman was concerned that official and foreign citizen reaction to hostile demonstrations at their embassies in Washington would jeopardize the safety of American citizens and diplomats in their countries.

The State Department Director of Foreign Missions, James E. Nolan, Jr., stated in his declaration that the statute remains "essential" to these foreign policy interests of the United States. (J.A. 24) The United States seeks buffer areas in which hostile demonstrations cannot take place at American embassies similar to that established by § 22-1115. Thus, "our embassies abroad seek host government cooperation in establishing police-enforced demonstration proximity limits at maximum distances from American facilities." (J.A. 25) Where State Department security officers have been unsuccessful in negotiating such proximity limits, "we have suffered the unfortunate consequences of personal injury and property damage." *(Id.)* Mr. Nolan predicted that, without § 22-1115, other countries would be unwilling to "establish maximum buffer zones." *(Id.)* Both Mr. Nolan and Assistant Secretary of State for Security, David Fields, stated that an injunction against enforcement of § 22-1115 would be interpreted by other governments as a reduction in the level of security for their embassies, and that foreign governments are likely to take reciprocal action to reduce similar protection at United States' embassies. (J.A. 16-17, 24-25)

Reciprocal action of that sort is expressly permitted by the Vienna Convention on Diplomatic Relations.[16] A signatory to the Convention, which ordinarily does not permit hostile demonstrations at foreign embassies, would not have to enforce that law at the United States mission if it

[16] The affidavit of James E. Nolan, Jr., states that increased protections for U.S. missions are often negotiated. That is permitted by Article 47(2)(b).

did not receive the same protection at its mission in Washington.[17]

It is the predicted inability of the United States to obtain protection against hostile demonstrations that most concerned the high-level State Department officials who submitted affidavits in this case. Secretary of State George P. Shultz articulated the same concern in his June 30, 1987 letter to the Chairman of the District of Columbia Council. *See supra* at note 6.

4. *The duty to protect and maintain the inviolability of the foreign mission.* The inviolability of foreign missions and their premises is recognized by all nations.[18] It means that representatives of a host state may not enter the premises of the mission "except with the express consent of the head of the mission."[19]

The inviolability of foreign missions and premises was strongly reaffirmed in the Vienna Convention on Diplomatic Relations. Amendments to Article 22 were rejected that would have permitted the receiving state to enter the premises to take "such measures as are essential for the protection of life and property in exceptional circumstances of

[17] Article 47(1) of the Convention does not permit a signatory receiving State to "discriminate as between States" in "the application of the provisions of the present Convention." However, Article 47(2)(a) states that discrimination "shall not be regarded as taking place where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State." The comment of the International Law Commission states the "rule of reciprocity which is very generally applicable in the matter of diplomatic relations" as the basis for the section. II Yearbook of the International Law Commission 105 (1958). Thus, any signatory to the Convention is required to enforce its laws implementing Articles 22 and 30 (relating to protection of foreign missions and foreign diplomatic residences) at least on a non-discriminatory basis. However, it need not uniformly enforce those laws with regard to a country that does not provide equivalent protections.

[18] Article 22(1) of the Vienna Convention on Diplomatic Relations.

[19] *Id.*

public emergency or danger," or would have required that "the head of the mission shall cooperate with the local authorities in case of fire, epidemic or other extreme emergency."[20] The majority of delegations concluded it would be dangerous to allow the receiving state to determine when "exceptional circumstances" existed, and that in times of "extreme emergency", it was more important to preserve the inviolability of mission premises.[21] Article 45 of the Convention provides for the inviolability of the mission and its archives even in the event of armed conflict with the sending state or a break in diplomatic relations.[22]

The affidavits of security personnel submitted in the trial court attest to the virtual impossibility of providing security to the mission and still maintaining inviolability without a zone of 500 feet between embassy premises and demonstrators, because there would be "no secondary (or fall back) defensive position available to [police] personnel inside the protected premises." (J.A. 27)

5. *Congress' reliance on the District government is consistent with these national interests. Amicus* ACLU argues that Congress determined that these interests are no longer significant when, in 1986, it passed a law[23] stating the sense of Congress that the District of Columbia Council "should review and, if appropriate, make revisions in the laws of the District of Columbia [including primarily § 22-1115] concerning demonstrations near foreign missions." (ACLU Br. at 15-17) The very section the ACLU relies upon recognizes that, in enforcing laws concerning demonstrations, the

[20] E. Denza, *Diplomatic Relations: Commentary on the Vienna Convention on Diplomatic Relations*, 83-84 (1976); *Report of the U.S. Delegation to the U.N. Conference on Diplomatic Intercourse and Immunities*, 13 (July 13, 1961).

[21] *Dienza, supra* note 20, at 84; Kerley, *Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities*, 56 Am. J. Int'l L., 102-03 (1962).

[22] *Report of U.S. Delegation, supra* note 20 at 26-27.

[23] Pub. L. 99-399, § 1302, 100 Stat. 853, 897 (Aug. 27, 1986).

District government is performing "the obligation of the United States to provide adequate security for the missions and personnel of foreign governments" and stated that any changes in the law should be made "in consultation with the Secretary of State and the Secretary of the Treasury." *(Id.)*

The 1986 statement of the sense of Congress is not an abandonment of the federal interest. It is a reaffirmation of the wisdom of the local system of government created in 1973,[24] and it demonstrates confidence in the District government's ability to provide police services in a broad range of areas that impact on the federal interest, including the protection of embassies.[25]

Nationally, the federal government depends chiefly upon state and local governments to protect foreign diplomats and missions, for which federal reimbursement is provided. *Hearings on Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations for 1988 before the House of Representatives Committee on Appropriations*, 100th Cong. lst Sess. 402-408 (April 1, 1987). The requested appropriation for fiscal year 1988 was approximately $10 million; $7 million of that amount would be paid to New York City for security provided representatives to the United Nations. *Id.* at 403-04, 406.[26] Thus, reliance on the District government is also consistent with national policy.

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[24] Pub. L. 93-198, 87 Stat. 774 (Dec. 24, 1973).

[25] In 1937, Congress also relied upon the judgment of the District's police department that existing law was inadequate for control of demonstrations at embassies. Report of Inspector Kelly, 81 Cong. Rec. 8486 (1937).

[26] In controlling political demonstrations, New York City enforces local law which, like § 22-1115, permits much stricter control of demonstrations than does 18 U.S.C. § 112(b). *See Concerned Jewish Youth v. McGuire*, 621 F.2d 471, 472-73, 475 (2d Cir. 1980), *cert. denied*, 450 U.S. 913 (1981).

C. Section 22-1115 Rests upon Compelling National Interests.

Section 22-1115 meets the tests of constitutionality for a content-based restriction of speech in a public forum. The statute is supported by compelling governmental interests and those interests could not be served with a significantly smaller impact on speech. *See e.g., United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983); *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981). Moreover, content-based speech analysis does not fit nicely into this case, because the government is not picking and choosing the speech targeted. Instead, it is applying neutral criteria; the policies of foreign governments, rather than those of the District or the United States, define speech prohibited by the statute.

1. There are exceptionally strong interests in regulating the speech at issue here arising from (1) an agreement between nations to establish diplomatic relations; (2) an agreement between nations concerning the location of the foreign embassy in the District of Columbia; (3) at least an implied agreement that the host country will comply with international law; (4) customary international law obligations and treaty obligations in the Vienna Convention, Art. 22(2), "to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity"; and (5) a determination by the Congress that those international obligations and important national interests require the restrictions on speech imposed by § 22-1115. These factors, and overall foreign policy considerations, permit the regulation of speech in order to bring the nation into conformance with international agreements and obligations. *Cf. Greer v. Spock*, 424 U.S. 828, 836-37 (1976); *Cox v. Louisiana*, 379 U.S. 559, 560-64 (1965).

Section 22-1115 also serves other important national interests. The 500-foot buffer zone gives police and Secret Serv-

ice personnel a realistic opportunity to protect embassies and other missions when demonstrations erupt into violence. Protective personnel state that the area provided is essential for their protective function, because they cannot take up protective positions on embassy grounds without invitation. Foreign governments should not be put to the choice between adequate security and a United States presence on their embassy grounds or buildings.

In the view of security experts, reduced security to foreign missions here would result in reduced security to our diplomats and embassies in other countries. Our diplomats are already at serious risk in many places; there is a strong national interest in ensuring that that risk is not increased.

The interests supporting § 22-1115 are at least as strong as others that have been found to be sufficiently compelling to restrict First Amendment interests. Compelling national interests in maintaining the integrity and appearance of propriety in the civil service justify an almost total exclusion of all civil servants from partisan political activity. *See U.S. Civil Services Commission v. National Ass'n of Letter Carriers*, 413 U.S. 548, 564-565 (1973). Similarly, compelling interests in maintaining propriety, and the appearance that elected officials are not purchased, justify substantial limits on the First Amendment interest in making political contributions to candidates for office. *See Buckley v. Valeo*, 424 U.S. 11, 26-27 (1976) (per curiam). Compelling interests also permit a state to require political candidates to show substantial political support in order to obtain a place on election ballots. *See, e.g., Munro v. Socialist Workers Party*, 107 S. Ct. 533, 537-38 (1986); *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 n.9 (1983); *American Party of Texas v. White*, 415 U.S. 767, 782 n.14 (1974). And, compelling state interests in prohibiting private gender discrimination permit restriction of the right of association. *See Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984).

2. The interests weighing against regulation are not as strong as in the public forum cases relied on by petitioners. Those cases assume that shielding domestic officials from public protest is incompatible with our democratic structure, which depends on public criticism to promote responsive government. *See, e.g., Edwards v. South Carolina*, 372 U.S. 289 (1963); *United States v. Grace, supra; Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). However, as the court of appeals noted, "[f]oreign ambassadors, in contrast, have no similar obligation to be accessible to public attack, and our polity does not have the same interest in ensuring that they are." (App. 23a) Indeed, for nearly 200 years, it has been a felony for an American without authorization to communicate with foreign officials concerning matters of diplomatic interest. 18 U.S.C. § 953.

3. The restrictions imposed by § 22-1115 are not content-based, because they are "aimed not at the *content* of the [picket signs] . . . but rather at the *secondary effects*" such demonstrations have on the conduct of foreign relations and with our ability to comply with international law. *Cf. City of Renton v. Playtime Theatres, Inc.*, 106 S. Ct. 925, 929 (1986)(emphasis in original); *Young v. American Mini Theatres*, 427 U.S. 50 (1976).

The evil to be avoided under the rubric of content/viewpoint discrimination is having the government pick and choose between messages presented. *Perry Education Ass'n v. Perry Local Educators' Ass'n, supra*, 460 U.S. at 54-55. Expression may not be forbidden "merely because public officials disapprove of the speaker's views." *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951)(Frankfurter, J., concurring in result). *See also, Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). Section 22-1115 passes these tests.

The statute makes no attempt to exclude a point of view or to suppress an unpopular cause. As the legislative history of the section recites, and the declarations of high-level State and Treasury Department officials make clear, it is the

diplomatic character of the buildings that creates the need for different treatment. Furthermore, it is the policies of the particular foreign government, rather than the views of a domestic government, that define the speech prohibited at each embassy. And, expressive conduct critical of a foreign guest is prohibited only within 500 feet from the embassy or diplomatic building. The message may be expressed 500 feet away or in any other lawful manner.

4. It is not at all uncommon in our jurisprudence to limit the right to engage in protest demonstrations based on the place of the demonstration where there are involved interests of equal, or lesser, magnitude than those that support § 22-1115. The special character of a jail allows a state to ban on-site peaceful picketing and other First Amendment conduct. See *Adderley v. Florida*, 385 U.S. 39, 41 (1966). Courthouse picketing can be regulated based on the "legitimate interest" in protecting the judicial system from undue pressures and the appearance of bending to outside pressure. *Cox v. Louisiana*, 379 U.S. 559, 562 (1965). Political speakers can be excluded from military bases, because the function of the base is "to train soldiers rather than host political events." *Greer v. Spock, supra*, 424 U.S. at 838. Picketing near a school can be banned, because it might disturb educational activities inside. *See Grayned v. City of Rockford*, 408 U.S. 104 (1972). Protest demonstrations by Americans at foreign embassies implicate far more important national interests and international concerns than picketing at any of these domestic institutions.

e. Petitioners argue that the interest served here is not compelling because other countries (identifying only the Soviet Union) provide less protection.[27] *Amicus* ACLU makes a similar argument referring to the practice in Great

[27] Petitioners ask the Court to limit the power of Congress under Art. I, § 8, cl. 10 by holding its definition of the law nations must be based on the practice in other countries. They identify the Soviet Union as their
[Footnote continued on next page]

Britain. The practice in other nations does not limit congressional power; Congress can legislate with reference to conditions in this country and adopt its determination of international law based on its view of what is appropriate in light of national interests and international obligations.[28] Petitioners also argue that § 22-1115 is not necessary because 18 U.S.C. § 112 imposes fewer restrictions in other parts of the country. However, the only city reasonably comparable to Washington is New York City with its large concentra-

[27] [Footnote continued from previous page]
model. (Pet. Br. at 32-33). In recent memory, the Soviet Union has permitted at least two violent assaults by mobs upon the United States' embassy in Moscow, which the Soviet Union conceded (by payment of reparations) violated international law. See *State Department Report*, 111 Cong. Rec. 9231 (1965); 7 M. Whiteman, *Digest of International Law*, 386-388 (1970). If the Soviet Union wishes to violate our view of international law (and that of most other nations) by orchestrating political protests, and by marching its citizens six abreast in protest rallies at the doors of our embassy in Moscow (*See* J.A. at 31), some diplomatic protests or even reprisals from our government may be appropriate. But that should be determined by the President and the State Department. A self-inflicted wound — namely, striking down an Act of Congress — is not an appropriate response to lawless behavior by the Soviets. The practice of other countries is simply not a basis for determining the scope of congressional power.

[28] There are substantial controls on political demonstrations in Britain which the ACLU did not describe. (ACLU Br. at 27). Demonstrations are restricted to the other side of a street from an embassy and police are given broad discretion in controlling them.

> . . . . The police are the best judges in each case of the controls required: how to preserve the peace and dignity of a mission is essentially a matter of sensible policing practice rather than a question of law. Only rarely will consultation with the Home Office and the FCO be required, *e.g.* at time of increased tension.

Diplomatic Privileges and Immunities: Government Report on the Vienna Convention on Diplomatic Relations, Cmnd 9497 (1985), *reprinted in The British Yearbook of International Law*, 446 (1985).

It is questionable that police in this country could be given the same degree of discretion in light of this Court's vagueness jurisprudence. Britain has a different system, and its Parliament is not bound by the same constitutional constraints as Congress. What works there may not be possible here.

tion of delegations to the United Nations. There, demonstrations are controlled by local police with financial support from the State Department. New York enforces its own, rather than federal, law and the restrictions it has found necessary are similar to those in 22-1115. See, *Concerned Jewish Youth v. McGuire*, 621 F.2d 471, 472-73, 475 (2d Cir. 1980), *cert. denied*, 450 U.S. 913 (1981).

Compelling national interests support the geographical limits on demonstrations imposed by § 22-1115.

II. The "Flag And Banner" Portion Of The Statute Is Not Vague Nor Overbroad; Petitioners' Vagueness And Overbreadth Claims Are Merely Recastings Of Their Arguments On The Merits.

A. Petitioners challenge on vagueness grounds the two phrases in the first clause of § 22-1115 which make it unlawful to display any flag or banner, in a manner adapted to "bring into public odium" any foreign government or organization or to bring into "public disrepute" governmental actions of a foreign government or its officers. They argue that the terms "public odium" and "public disrepute" are vague. (Pet. Br. at 17-18). Their vagueness challenge is predicated on an improper construction of the section. They argue that Congress prohibited picketing (signs, flags or banners) that bring into "public odium" or "public disrepute" foreign officials or governments, but did not prohibit picketing which is merely critical of foreign governments or officials but not odious.

Their vagueness challenge is that an officer has an insufficient basis to distinguish between odious picketing and that which is merely critical. The statute does not establish a residuum of flag and banner carrying, critical of foreign

governments or officials, that is not prohibited.[29] The legislative history makes it clear that Congress intended to prohibit all demonstrating against foreign governments involving flags or banners. That is clear from the statements of Senator Pittman, chief sponsor, who stated, in the floor debates, that all picketing against foreign governments or officials would bring them into public odium or public disrepute. He indicated that the very purpose of picketing was "the desire to bring into odium the government whose embassy or legation is being picketed" and that the intent of the legislation was to ban even small assemblages of people who "carry placards critical of [foreign] governments." *See* discussion *supra* at page 6-7.

The only determination that an officer must make in the enforcement of the statute is whether a flag or banner is critical of foreign governments or officials. As a practical matter that is not difficult, because demonstrations and demonstrators are self-defining in their positions. It makes little sense for a demonstrator to stand before an embassy and take an ambiguous position. The only difficulty in enforcement is when the placard, banner, or device is in a foreign language that the officer does not understand. But

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[29] The distinction has been used in enforcement of the statute but not in enforcing it against sign carriers. The Police Department affidavit indicates that the first clause of the statute has been enforced to ban all placards and banners that are critical of foreign governments. (J.A. 28) However, a different standard has been used concerning the distribution of leaflets; "leafletting" critical of a foreign government has been allowed "when the handout is not facially 'odius'." (Affidavit of Deputy Chief Conner, J.A. 28)

The "flag, banner or device" language apparently has been construed by the police as not including leaflets. The Court of Appeals said the clause applies "only when a protestor is carrying a sign of some sort." (App. 53a) However, this Court construed the similar "flag, banner, or device" language in 40 U.S.C. § 13k to include leaflets. *United States v. Grace, supra*, 461 U.S. at 176. There is, of course, no leafletting involved in this case.

that difficulty does not rise to a constitutional level. It represents a non constitutional problem in enforcement.[30]

In our view, the vagueness issue presented by petitioners is subsumed within the merits. Congress has prohibited all political demonstrations involving flags or banners that are hostile or critical of a foreign government or its officials within 500 feet of its embassy. The issue is whether it has the power to do that.

B. Petitioners' arguments that the "flag and banner" portion of § 22-1115 is overbroad, like their vagueness argument, assumes the success of their position on the merits. (Br. at 14-15). They argue that the statute is overbroad, because it prohibits expressive conduct which brings foreign governments into public "odium" or "disrepute" and which, without more, is constitutionally protected.

The issue raised on the merits is precisely the same as the one asserted in their overbreadth argument. If Congress can prohibit demonstrations against foreign governments which do not pose a physical threat of some sort (the issue on the merits), such conduct is not protected and a statute which prohibits it is not overbroad.

III. The Second Clause Of § 22-1115 Is Crafted To Honor The International Obligation To Protect Foreign Embassies; And Is Neither Vague Nor Overbroad.

A. The meaning of the "congregation clause" as construed.

The second clause of § 22-1115, which consists of a single sentence, prohibits congregations or assemblages of people

[30] For example, if a bank robber stood at a teller's window and said "give me money or I will shoot you" there would still be a crime even if the statement were made in a foreign language that a police officer, overhearing it, could not understand.

It has not been uncommon for demonstrators to present their messages in foreign languages not understood by public officers. *See, e.g., Zaimi v. United States*, 155 U.S. App. D.C. 66, 68, 476 F.2d 511, 513 (1973). This has presented a problem in enforcement of the statute.

at embassies and permits police to order them to disperse. The clause makes it unlawful

> . . . to congregate within 500 feet of any such building or premises, and refuse to disperse after having been ordered so to do by the police authorities of the said District.

Its principal purpose is protection against "threats to the security of the foreign government's representatives and property." (App. 3a-4a) That is because mobs have historically posed significant threats to the physical safety of embassies and diplomatic personnel and have placed great strains on relations between nations.

Under the common law of the District of Columbia, the term "congregate" means an assemblage of three or more people.[31] The District of Columbia courts have required that, to fall within the prohibition of the clause, a congregation have a direct relation to a foreign mission. An influential trial court decision interpreted the clause to prohibit

> those meetings, held within 500 feet [of an embassy] *which have a direct relationship to that nation*, including meetings which have as their purpose an expression of the views of the government involved, its personnel, or its policies.

United States v. Travers, 98 D. Wash. L. R. 1505, 1508-09 (D.C. Ct. Gen. Sess., Aug. 26, 1970).[32]

[31] See, *Zaimi v. United States*, 155 U.S. App. D.C. 66, 69 n. 18, 476 F.2d 511, 515 n.18 (1973); *Kinoy v. District of Columbia*, 130 U.S. App. D.C. 290, 298, 400 F.2d 761, 769 (1968) (appendix to opinion); *Hunter v. District of Columbia*, 47 App. D.C. 406, 409 (1918).

[32] We believe that *Travers* has been followed by all trial judges in prosecutions under § 22-1115. It represents controlling law in the view of the United States, which prosecutes alleged violations of the section. *See* Brief of the United States in *Vanna Om Strinko v. United States*, D.C. App. No. 85-1330, at 28, filed June 6, 1986. The appeal remains pending.

Amici, Lipkin, *et al.*, assert that *Travers* was not followed in the prosecution against them. (Lipkin Br. at 12). We do not understand this assertion; the stipulated facts show that the matter was undisputed. (Id. at 6-7).

The court of appeals further interpreted the statute and further limited its scope in this case by setting the circumstances that would permit the police to order dispersal of people who have congregated near an embassy. The court held that authority to order dispersal of a group "may be exercised . . . only when the police reasonably believe that a threat to the security or peace of the mission is present." (App. 43a) This was found to be the "most plausible construction" of the language and flowed from "the unexceptional principle that statutes are construed in light of the purposes behind their enactment." (*Id.*)[33]

In accordance with the peace and safety rationale of the second clause, not all protest demonstrations are prohibited. Vigils are permitted. Thus, there has been "a constant vigil on the steps of the Phillip Murray building which is within 500 feet of the Russian Embassy since approximately 1970,

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[33] This is a limiting construction that alters the vagueness issue for this case. *See Bouie v. City of Columbia*, 378 U.S. 347, 362 (1964). Any threat to the physical safety of the mission would also warrant a dispersal order.

The court of appeals has broader authority concerning § 22-1115 than other D.C. Code provisions. Congress enacted the statute under its general power to define and punish offenses against the law of nations (Art. 1, § 8, cl. 10) rather than as local legislation for the District. Strong federal interests are shown in the legislative history of the statute, and a continuing national interest is demonstrated by the statements of Secretary Shultz and the affidavits of high-level State Department and Secret Service officials.

The exercise of authority to construe this statute is consistent with circuit precedent in treating D.C. Code provisions as raising a "federal question" for jurisdictional purposes when they directly affect federal interests. *See Thomas v. Barry*, 234 U.S. App. D.C. 378, 380, 729 F.2d 1469, 1471 (1984) (construing 28 U.S.C. § 1364, which excludes from federal court jurisdiction, "laws of the United States or Acts of Congress . . . applicable exclusively to the District of Columbia.") By contrast, the circuit holds that no federal question is presented by statutes of purely local application or which have only an incidental effect on the federal interest, and it applies principles analogous to abstention, like those applied to state legislation in federal courts. *See e.g. Dimond v. District of Columbia*, 253 U.S. App. D.C. 111, 120-22, 792 F.2d 179, 188-90 (1986); *Financial General Bankshares, Inc. v. Metzger*, 220 U.S. App. D.C. 219, 223, 680 F.2d 768, 772 (1982).

in order to bring public attention to the plight of Soviet Jews." (J.A. 28) There was also a candlelight vigil across the street from the Iranian Embassy for several months in late 1979 and early 1980 to protest Iran's taking of American citizens as hostages. (*Id.*)

It seems clear from those portions of the court's opinion dealing with the first, or "flag and banner," clause that a threat to the peace of the mission would include demonstrative activities that assault the peace and dignity of the mission in the way that picketing does. (App. 14a-16a) Thus, the functional equivalents of picketing (acts by an assemblage like singing, chanting, walking back and forth, and other acts done in unison) would threaten the peace of the embassy and permit a dispersal order. Acts that limit ingress or egress, or that are calculated to harass, intimidate, or coerce embassy personnel, would also threaten its peace and/or safety. Any threat to the physical safety of the mission would also warrant a dispersal order.

B. The "congregation clause" is not vague.

Petitioners argue that, even as construed by the court of appeals, the second clause of § 22-1115 is vague because it fails to provide adequate standards for the police. (Pet. Br. at 42-43). The construction, which is a part of the statute for vagueness purposes, provides ample guidelines.

A statute is void for vagueness under the Due Process Clause if its prohibitions are not defined so that ordinary individuals can understand them or if their language encourages arbitrary and discriminatory enforcement. *See Kolendar v. Lawson*, 461 U.S. 352, 357 (1983). The dangers of vague laws in the context of First Amendment rights are explained in *Grayned v. City of Rockford*, 408 U.S. 104 (1972):

> Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A

> vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.

Id. at 108-09 (citations and internal quotation marks omitted). The second clause of 22-1115 does not run afoul of this standard.

The clause prohibits congregations within 500 feet of an embassy only when they have a direct relationship to that mission. That part of the prohibition is clear; any police officer and any ordinary citizen can understand it. Under the limiting construction of the court of appeals, an officer can order dispersal of an assemblage that has a direct relationship to the embassy only when he reasonably believes there is a threat to the security or peace of the mission.[34]

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[34] Petitioners argue that the clause authorizes the police in their unfettered discretion to order dispersal of every meeting that occurs within 500 feet of an embassy in the District of Columbia, regardless of its purpose, and regardless of whether it has any relationship to the foreign government or its embassy. (Pet. Br. at 36-37) The only way petitioners can so conclude is to read the words of the clause in a vacuum as if they were divorced from the history of the statute, its purposes, and the words that precede it in the first clause of the same sentence.

A federal court must consider limiting constructions when an act of Congress or a state statute is challenged for overbreadth. The constructions that must be considered include those that another "court or enforcement agency has proffered." *Kolender v. Lawson*, 461 U.S. 352, 365 (1983), quoting *Hoffman v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982). And, when an act of Congress is challenged, a federal court has a duty to construe the statute in a manner that upholds its constitutionality if that can be done by any fair reading of the law. *Schneider v. Smith*, 390 U.S. 17, 26-27 (1968). Here, there is more than an ample basis to construe the clause to avoid the overbreadth that petitioners assert is inherent.

These are the sorts of "guidelines to govern law enforcement" that meet due process standards. *Smith v. Goguen*, 415 U.S. 566, 574 (1974). Congress has made the basic policy choices, and, as construed, the statute requires only a minimal degree of police judgment.

The standards established are virtually identical to those upheld in *Grayned v. City of Rockford, supra*, in which the Court considered an ordinance which made it unlawful for a person "'on public or private grounds adjacent'" to a school to "'willfully make . . . any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof . . .'" 408 U.S. at 108. The Court found that the language of the ordinance "clearly 'delineates its reach in words of common understanding';" Id. at 112, quoting *Cameron v. Johnson*, 390 U.S. 611, 616 (1968). In reasoning, equally applicable to § 22-1115, the Court said:

> Although the prohibited quantum of disturbance is not specified in the ordinance, it is apparent from the statute's announced purpose that the measure is whether normal school activity has been or is about to be disrupted. We do not have here a vague, general "breach of the peace" ordinance, but a statute written specifically for the school context where the prohibited disturbances are easily measured by their impact on the normal activities of the school. Given this "particular context," the ordinance gives "fair notice to those to whom [it] is directed."

Id. at 112 (footnote and citation omitted)

The notice provided by § 22-1115 is also as adequate as that found in *Cox v. Louisiana*, 379 U.S. 559 (1965), where a statute made unlawful demonstrations "near" a courthouse if done "with the intent of interfering with, obstructing, or impeding the administration of justice" or of "influencing any judge, juror, witness or court officer, in the discharge

of his duty." *Id.* at 560. The Court upheld the statute as being "narrowly drawn to punish specific conduct that infringes a substantial state interest in protecting the judicial process." *Id.* at 564.

A narrowly drawn statute which aims at specific conduct at specific sites does not present the same vagueness problems as more generally drawn statutes like those that punish generally disorderly conduct or breaches of the peace. *Adderley v. Florida*, 385 U.S. 39, 42 (1966). Thus, a general disturbing the peace statute cannot be used to preserve a decorous atmosphere in a courthouse, but a more narrowly drawn statute can be used where it provides "notice that certain kinds of otherwise permissible speech or conduct would not be tolerated." *Cohen v. California*, 403 U.S. 15, 19 (1971). See also, *Edwards v. South Carolina*, 372 U.S. 229, 236 (1963). The congregation clause of § 22-1115, as construed, prohibits only specific conduct of an assemblage that threatens the safety or peace of the mission. Certainly, it is no more difficult for a police officer to determine that a demonstration threatens the peace of an embassy than it is to determine that a demonstration at a high school "disturbs or tends to disturb the peace or good order of such school session or class thereof." *Grayned v. City of Rockford, supra* at 112. From the standpoint of vagueness, the statutes are indistinguishable. Moreover, Section 22-1115 provides a protection not found in *Grayned;* it is that only the failure to disperse after a police order which makes an embassy demonstrator liable for arrest.

As the court of appeals noted, officers must make determinations of the tendency of conduct or words to provoke evils which must be guarded against on a daily basis in enforcement of various laws, including breach of the peace statutes. (App. 41a-43a) *See e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cohen v. California, supra.* Thus, the determinations which must be made under the second clause, as construed, are very similar to others that officers must make.

Police also have as part of their duties the control of assemblages or crowds at fires, at other demonstrations, at parades and other public events, at disaster sites, for the movement of traffic, and to protect persons or property. And, as noted by the court of appeals, police in those circumstances "have always possessed authority to require people to move when a statute supplies the criteria that guide and confine police discretion." (App. 41a) *See Washington Mobilization Committee v. Cullinane*, 184 U.S. App. D.C. 215, 227, 566 F.2d 107, 119 (1977) (rejecting the argument that the police were allowed "unfettered discretion" in enforcing the District of Columbia breach of the peace statute, D.C. Code § 22-1121 (2), and the Police Line Regulation of Article VI, 5a of the District's police regulations).

Police need more authority in controlling assemblages at embassies than at domestic buildings only because Congress has chosen to honor fully the international obligation to protect the safety and peace of foreign missions and embassy personnel. Police do not have unbridled power; they provide the degree of protection that is necessary in the national interest to honor international obligations. The standards for doing so are provided by § 22-1115, and they are fully adequate.

IV. The Labor Picketing Exemption in § 22-1116 does not Violate Petitioners' Rights to Equal Protection of the Laws.

Petitioners argue that the exemption in D.C. Code § 22-1116 (1981) for labor picketing at missions and other official buildings where business is conducted denies them equal protection of the laws. The exemption applies only to bona fide labor disputes relating to construction, repair or alteration of the building, and provides:

> [N]othing contained in [§ 22-1115] shall be construed to prohibit picketing, as a result of bona fide labor disputes regarding the alteration, repair, or con-

> struction of either buildings or premises occupied, for business purposes, wholly or in part, by representatives of foreign governments.

The legislative history to the exemption is sparse.[35]

Relying on *Carey v. Brown*, 447 U.S. 455 (1980), and *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), petitioners argue that the exemption in § 22-1116 violates their right to equal protection by making an impermissible distinction between labor picketing and demonstrations involving the foreign governments' policies. *Mosley* arose out of a challenge to a Chicago ordinance that prohibited picketing in front of any school other than one "involved in a labor dispute." 408 U.S. at 93. The Court held that the ordinance violated the Equal Protection Clause because it impermissibly distinguished between labor picketing and all other peaceful picketing without any showing that the latter was "clearly more disruptive" than the former. *Id.* at 100. Similarly, *Carey v. Brown* arose from a challenge to a statute that generally prohibited picketing of residences or dwellings, but exempted from its prohibition peaceful picketing of a place of employment involved in a labor dispute. The Court held that, standing alone, Illinois' interest in promoting the privacy of the home was not sufficient to save the statute, since the legislation made no attempt to distinguish among various sorts of non-labor picketing on the basis of the harms they would inflict on the privacy interest. 447 U.S. at 461-462.

The court of appeals rejected petitioners' equal protection challenge on the ground that labor picketing implicates entirely different interests than those which are served by the ban on the demonstrations prohibited by § 22-1115. (App. 48a n.19). The court relied on the reasoning of the three-judge

[35] The exemption was offered as an amendment at the end of the Senate debate on Joint Resolution No. 191 by Senator LaFollette without a statement of supporting reasons. 81 Cong. Rec. at 8593. It was then read, and Senator Pittman, the law's sponsor, said "I have no objection to that." (*Id.*) It was immediately adopted by a voice vote. (Id.)

court in *Jewish Defense League v. Washington*, 347 F. Supp. 1300 (D.D.C. 1972), that the prohibitions in § 22-1115 serve "a governmental interest of a higher quantum than that involved in *Mosely*." 374 F. Supp. at 1301. The three-judge court stated:

> Here the Congressional Act only forbids certain types of activity designed to "intimidate, coerce, or bring into public odium" or "harass" or "bring into public disrepute" the foreign State, its representatives or its policies.
>
> There is an obvious distinction to be made between this type of activity forbidden by the statute and the picketing incident to a bona fide labor dispute over construction work. Congress may very well have thought that such labor picketing would not have the disturbing impact on the foreign State or its representatives against which the statute is designed to protect. Such a construction dispute and picketing relating thereto might very well be aimed, not at the embassy or at its personnel, but at the contractor doing the construction or repair work. A labor dispute is by its nature a *domestic one*, involving labor or business questions which the public takes as a fact of everyday commercial life.

Id. at 1301-02 (emphasis in original, footnotes omitted)

Congress clearly believed that labor picketing did not implicate either the same foreign government interests or the same national interests that are involved in picketing and demonstrations that are critical of foreign government's policies. Senator Pittman, who had argued so forcefully in support of the legislation, had "no objection" to the labor exemption. 81 Cong. Rec. at 8593. To a foreign government, labor picketing involves only a very limited range of activities in the United States — namely, the construction, repair, or alteration of property it owns or leases in the United States at the site of the picketing. Moreover, labor picketing involves an economic relationship between the foreign government

and American citizens who are directly affected by that limited range of activity by the foreign government in this country. From the point of view of the United States government, the labor exemption involves protection of economic interests of American citizens who are directly affected by domestic activities of the foreign governments.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY

BRIEF

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IN THE

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OCTOBER TERM, 1987

MICHAEL BOOS, J. MICHAEL WALLER and
BRIDGET BROOKER,
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v.

MARION S. BARRY, JR., MAURICE T. TURNER,
THE DISTRICT OF COLUMBIA and
FATHER R. DAVID FINZER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
ARGUMENT	1
CONCLUSION	6
ADDENDUM	1a

TABLE OF AUTHORITIES

CASES:

Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc., —— U.S. ——, 107 S.Ct. 2568 (1987) 3

STATUTES:

18 U.S.C. § 112 ..... 4, 5
18 U.S.C. § 112(a) 4
18 U.S.C. § 112(b) 4
18 U.S.C. § 112(b)(1) 4
18 U.S.C. § 112(b)(2) 4
18 U.S.C. § 112(c)(1) (1973) 4
18 U.S.C. § 953 3
D.C. Code § 22-1115 ..... 2, 3, 4, 5
District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 744 (1973) 5

MISCELLANEOUS:

132 Cong. Rec. S11427 (daily ed. Aug. 12, 1986) .. 5
133 Cong. Rec. S12970 (daily ed. Sept. 29, 1987) .. 6
133 Cong. Rec. S12971 (daily ed. Sept. 29, 1987) .. 5, 6
133 Cong. Rec. S13038 (daily ed. Sept. 29, 1987) .. 6
E. Vattel, The Law of Nations (J. Chitty ed. 1859) 3

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REPLY BRIEF FOR PETITIONERS

The briefs of *amicus curiae* and Respondents are noteworthy for their failure to confront several of the arguments made in Petitioners' opening brief. The arguments which *amicus curiae* and Respondents do make warrant a short reply.

ARGUMENT

A. A central theme of the brief of the United States as *amicus curiae* (the "government")—though not stated in these terms—is that speech displayed on picket signs should be entitled to far less First Amendment protection than speech employed in various other modes of expression. Thus the government argues (Br. pp. 30, 32) that

Congress can give foreign officials "immunity" from picketing, and declare that the public streets and sidewalks in the Nation's Capital lose their public status when used for demonstrations against foreign officials or governments. Since foreign officials have no "immunity" from insulting speech when delivered by anyone else in any other mode of communication, there is no reason why they should enjoy an immunity from speech on picket signs.

On a different note, the government argues (Br. p. 29) that a foreign embassy occupies no place in the domestic political structure established by the Constitution. If the argument is that the First Amendment does not give the people the right to speak out on our relations with specific foreign countries, it is obviously wrong. If, instead, the implication is that our relations with foreign governments is an important part of our domestic political structure which can be addressed by some people—but not those who rely upon effective picketing to communicate their message—then the argument discriminates improperly.

Respondents argue (Br. p. 23) that D.C. Code § 22-1115 can be sustained on the theory that foreign buildings in the District (if not in the 50 states) are foreign territory outside the American system of free expression. If the argument is that the private property upon which foreign buildings sit is foreign territory, it is irrelevant. Petitioners wish to picket on public sidewalks, not private property. But if the argument is that all property within the 500 foot zones is foreign territory, it is, at best, creative. Under this argument, the Soviet Union could insist that employees of *The Washington Post* (and anyone else employed within 500 feet of the Soviet Embassy) would need a Soviet visa to go to work in the morning.[1]

[1] Contrary to the position of *amicus* and Respondents, § 1115 does not regulate the "secondary effects" of speech. Instead it zeroes in on the central purpose of the speech, and defines crimes solely in terms of the message displayed on a sign. Nor can the messages Petitioners wish to convey be considered even remotely analogous to "fighting words." If that narrow category of conduct not protected by the First Amendment was stretched to cover this case, it would swallow large categories of expression repeatedly held entitled to First Amendment protection.

Quoting E. Vattel, *The Law of Nations*, 463 (J. Chitty ed. 1859), the United States makes the sweeping argument (Br. p. 19) that "[w]hoever offends and insults a public minister commits a crime" against international law. The government then comes full circle and says that Petitioners can insult foreign ambassadors and foreign governments after all. Under this position (Br. p. 27), so long as they do not display offensive messages on signs within the 500 foot zones, Petitioners are free to express their messages in the press or the broadcast media.[2] While in theory both the rich and poor may have an equal right to buy newspaper ads or television time, in practice Petitioners and other ordinary people must rely instead upon peaceful picketing as a more affordable means of communication. Speech on picket signs should be entitled to as much First Amendment protection as other forms of protected speech. *See Board of Airport Commissioners of the City of Los Angeles* v. *Jews for Jesus, Inc.*, —— U.S. ——, 107 S.Ct. 2568 (1987).

B. Contrary to the argument of the United States (Br. pp. 14-17) and Respondents (Br. pp. 10-12), the affidavits filed in District Court contending that the first clause of D.C. Code § 22-1115 serves important security interests are not highly pertinent to this case. These affi-

[2] Especially given this position, we fail to see the relevance of the government's reliance (Br. pp. 30-31) on the Logan Act, now codified at 18 U.S.C. § 953. Petitioners seek no license to conduct diplomatic relations with foreign powers. They seek to criticize and publicize the conduct of foreign governments so as to build domestic support here at home for policies advocated by Petitioners.

davits rest upon the implausible premise that law enforcement authorities in the District of Columbia, with their extensive experience in dealing with demonstrations, lack the ability to carry out those functions which state and local police departments everywhere else in the United States perform routinely. Equally important, the majority below ultimately recognized the irrelevance of these affidavits when it acknowledged that the first clause could not be supported by any alleged security interest:

> "The only conceivable interest that would support such a restriction of speech is that of dignity and peace" (App. 33a).

C. The United States (Br. p. 25 n.18) attempts to explain Congress' enactment of 18 U.S.C. § 112(b), the nationwide federal statute, by noting that in the 50 states Congress also relies on state and local laws to supplement protection for foreign officials. But this argument does not distinguish 18 U.S.C. § 112 from § 1115. Both statutes single out only foreign officials and foreign governments for special treatment, and both presuppose the existence of other local laws to provide supplemental coverage. Local laws prohibiting misdemeanors and felonies from trespasses to murder exist in the District of Columbia as well as the 50 states. If this Court holds that both clauses of § 1115 are unconstitutional, the only result will be that Petitioners and others will be free peacefully to picket and congregate within the 500 foot zones. The full panoply of District of Columbia laws prohibiting violence and intimidation, and 18 U.S.C. §§ 112(a) and (b)(1)-(2), will remain effective to protect foreign persons and property in the District.

D. As the government notes (Br. p. 25 n.18), when Congress in 1976 repealed the anti-picketing provision of 18 U.S.C. § 112(c)(1) (1973) (see Brief for Petitioners, p. 29), it did not repeal D.C. Code § 22-1115. There is a good reason why. The process of establishing Home

Rule in the District of Columbia culminated in 1973 with passage of the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 744 (1973). Subject to the retention by Congress of its ultimate legislative authority over the District under Art. I § 8, and certain other limitations, the legislative power of the District was vested in the Council of the District of Columbia. *Id.*, §§ 302, 404. When Congress amended 18 U.S.C. § 112 in 1976, it was acting in the uniquely federal area of implementing the Vienna Convention and defining the permissible boundaries of our national obligations under international law. Since Congress was legislating on a national level, the fact that it did not repeal a statute applicable in the District of Columbia under Home Rule has no more significance than the fact that it did not repeal any other state or local laws. This conclusion is strengthened by the fact that, after the Senate did repeal § 1115 in 1986, the Conference Committee decided instead to send the matter to the City Council for consideration, because of concerns that a federal repeal might violate Home Rule principles. 132 Cong. Rec. S11427 (daily ed. Aug. 12, 1986).

E. The government attaches to its brief a letter from Secretary of State Shultz urging the City Council not to repeal § 1115. More illuminating is the attached September 11, 1987 memorandum from a State Department official declaring the Main State Building a "foreign diplomatic mission." *See* 133 Cong. Rec. S12971 (daily ed. Sept. 29, 1987). This was done to allow law enforcement authorities to invoke § 1115 to prevent a demonstration by members of Congress and others against Soviet Foreign Minister Shevardnadze on the public sidewalks within 500 feet of the Department of State.[3] This

[3] As a result, the Senate passed by a 90 to 7 vote the United States Department of State Freedom of Expression Act of 1987, finding that the State Department acted to deny free speech, and

State Department effort to extend the coverage of § 1115 to domestic buildings further illustrates the extent to which this statute can be used and abused to prohibit peaceful free speech.

CONCLUSION

For these reasons, and those stated in our opening brief, the judgment below should be reversed.

Respectfully submitted,

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forbidding it from declaring itself a foreign mission again. 133 Cong. Rec. S13038 (daily ed. Sept. 29, 1987). *See id.* at S12970 to S12971.

ADDENDUM

UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

September 11, 1987

MEMORANDUM

TO: Mr. Francis A. Keating, II
Assistant Secretary for Enforcement
and Operations
U.S. Department of Treasury

FROM: DS/DSS—Louis Schwartz, Jr.

SUBJECT: Designation of a Foreign Diplomatic Mission

Soviet Foreign Minister Shevardnadze will visit Washington, D.C. from September 13-19, 1987. On September 15, he will be at the Department of State, 2201 C Street, N.W., Washington, D.C. for meetings with Secretary Shultz.

We have been advised of a planned demonstration against the Foreign Minister during his meetings at the State Department. As a result of this planned demonstration, we have designated the Department of State (Main State Building) as a "foreign diplomatic mission" with the meaning of 3 U.S.C., Section 202, for the duration of this visit.

cc: Mr. Lamb
Metropolitan Police Dept.
Special Operations
L/M—Mr. Thessin
S/CPR
OFM

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
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No. 86-803

In the Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL BOOS, ET AL., PETITIONERS

v.

MARION S. BARRY, JR., MAYOR,
DISTRICT OF COLUMBIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether D.C. Code § 22-1115 (1981)—which makes it unlawful, within 500 feet of a foreign embassy in the District of Columbia, (i) to display signs designed, inter alia, to bring the foreign government into "public odium" or its policies into "public disrepute," or (ii) to congregate and refuse to disperse after having been ordered to do so by the police—violates the First Amendment to the United States Constitution.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Introduction and summary of argument	5
Argument:	
Section 22-1115 of the District of Columbia Code is consistent with the First Amendment because it is narrowly tailored to further the compelling governmental interests in protecting the security, dignity and peaceful enjoyment of foreign missions in the District of Columbia	10
A. Section 22-1115 was enacted to secure the inviolability of foreign missions and encourage reciprocal protection for United States missions abroad, and it continues to further those purposes	10
B. Section 22-1115 serves compelling governmental interests grounded in the constitutional provisions that command respect for the Law of Nations and the rights of Ambassadors	18
C. The narrowly tailored restrictions in Section 22-1115 are consistent with the First Amendment	27
Conclusion	38
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Alaska Airlines, Inc. v. *Brock*, No. 85-920 (Mar. 25, 1987)	37
American Banana Co. v. *United Fruit Co.*, 213 U.S. 347 (1909)	31
Ames v. *Kansas*, 111 U.S. 449 (1884)	22
Australia/Eastern U.S.A. v. *United States*, 537 F. Supp. 807 (D.D.C. 1982)	29
Blodgett v. *Holden*, 275 U.S. 142 (1927)	5
Carey v. *Brown*, 447 U.S. 455 (1980)	36, 37

Cases—Continued: Page

Chicago & Southern Air Lines, Inc. v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948) 5
City Council v. *Taxpayers for Vincent*, 466 U.S. 789 (1984) 35
City of Houston v. *Hill*, No. 86-243 (June 15, 1987) 26
City of Los Angeles v. *Preferred Communications, Inc.*, No. 85-390 (June 2, 1986) 32
City of Renton v. *Playtime Theatres, Inc.*, No. 84-1360 (Feb. 25, 1986) 4, 34
City of Rome v. *United States*, 446 U.S. 156 (1980) 25
Concerned Jewish Youth v. *McGuire*, 621 F.2d 471 (2d Cir. 1980), cert. denied, 450 U.S. 913 (1981) 26
Connick v. *Myers*, 461 U.S. 138 (1983) 29
Cox v. *Louisiana*, 379 U.S. 559 (1965) 6, 9, 32, 33, 37
Dames & Moore v. *Regan*, 453 U.S. 654 (1981) 8, 30
Edwards v. *Louisiana*, 372 U.S. 229 (1963) 28, 29
Frend v. *United States*, 100 F.2d 691 (D.C. Cir. 1938), cert. denied, 306 U.S. 640 (1939) 2, 3, 6, 13, 23
Garrison v. *Louisiana*, 379 U.S. 64 (1964) 29
Hague v. *CIO*, 307 U.S. 496 (1939) 32
Hines v. *Davidowitz*, 312 U.S. 52 (1941) 18
Jewish Defense League, Inc. v. *Washington*, 347 F. Supp. 1300 (D.D.C. 1972) 6, 37
Jews for Urban Justice v. *Wilson*, 311 F. Supp. 1158 (D.D.C. 1970) 6
Kolender v. *Lawson*, 461 U.S. 352 (1983) 13
Laker Airways Ltd. v. *Pan American World Airways*, 604 F. Supp. 280 (D.D.C. 1984) 29
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 22
NAACP v. *Button*, 371 U.S. 415 (1963) 33
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 28
Occidental Petroleum Corp. v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), aff'd, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972) 29

Cases—Continued: Page

Perry Education Ass'n v. *Perry Local Educators Ass'n*, 460 U.S. 37 (1983) 35, 36
Personnel Administrator v. *Feeney*, 442 U.S. 256 (1979) 36
Police Department v. *Mosley*, 408 U.S. 92 (1972) 35, 36, 37
Respublica v. *Keating*, 1 Dall. 111 (Oyer. & Term. Pa. 1784) 22, 24
Rostker v. *Goldberg*, 453 U.S. 57 (1981) 5
Stromberg v. *California*, 283 U.S. 359 (1931) 28-29
Terminiello v. *Chicago*, 337 U.S. 1 (1949) 17
The Schooner Exchange v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812) 19, 21, 29-30
United States v. *Arjona*, 120 U.S. 479 (1887) 25
United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) 30
United States v. *Grace*, 461 U.S. 171 (1983) 33
United States v. *Hand*, 26 Fed. Cas. 103 (C.C.D. Pa. 1810) (No. 15,297) 24
United States v. *Smith*, 18 U.S. (5 Wheat.) 153 (1820) 23
Virginia Pharmacy Board v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) 34
Waldron v. *British Petroleum Co.*, 231 F. Supp. 72 (S.D.N.Y. 1964) 31
Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 5
Young v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) 17, 35
Zaimi v. *United States*, 476 F.2d 511 (D.C. Cir. 1973) 6, 13
Zschernig v. *Miller*, 389 U.S. 429 (1968) 18

Constitution, treaty and statutes:

Art. I 8, 21
§ 8, Cl. 10 ..... 3, 8, 21, 22
§ 8, Cl. 17 ..... 8, 27
Art. II 8, 21
§ 3 ..... 8, 21

Statutes—Continued: Page

Art. III 8, 21
§ 2, Cl. 1 21
§ 2, Cl. 2 ..... 8, 21
Amend. I ..... *passim*
Petition Clause 28
Amend. XIII, § 2 24
Amend. XIV, § 5 24
Amend. XV, § 2 24
Vienna Convention on Diplomatic Relations, Mar. 18, 1961:
Art. 22, 23 U.S.T. 3237 3
Art. 22(2), 23 U.S.T. 3237 ..... 7, 14, 16, 24, 25, 26, 27, 36
Art. 41(1), 23 U.S.T. 3247 ..... 9, 31
Art. 41(2), 23 U.S.T. 3247 31
Art. 47, 23 U.S.T. 3248-3249 17
Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28 31
Act of Apr. 30, 1790, ch. 9, 1 Stat. 112:
§ 25, 1 Stat. 117-118 22
§ 26, 1 Stat. 118 22
§ 28, 1 Stat. 118 22
Act of Jan. 30, 1799, ch. 1, 1 Stat. 613 31
Diplomatic Relations Act of 1972, Pub. L. No. 92-539, § 301, 86 Stat. 1072 25
Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 80 22
Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853:
§ 1302, 100 Stat. 897 16
§ 1302(3), 180 Stat. 897 16
Pub. L. No. 94-467, § 5, 90 Stat. 1999 25
S.J. Res. 191, ch. 29, § 1, 52 Stat. 30 1
3 U.S.C. 202 26
18 U.S.C. 112(b) 25, 26
18 U.S.C. (Supp. III 1973) 112(c) 25
18 U.S.C. 953 31
22 U.S.C. 254c 17
22 U.S.C. 2656 31
22 U.S.C. (& Supp. III) 4303 14

Statutes—Continued: Page

22 U.S.C. (& Supp. III) 4304(b) 17
22 U.S.C. 4306(d) 17
D.C. Code (1981):
§ 22-1115 ..... *passim*, 1a
§ 22-1116 36
Miscellaneous:
10 Annals of Cong. 613 (1800) 30
81 Cong. Rec. (1937):
p. 8484 13
pp. 8484-8485 11
p. 8485 ..... 12, 27
p. 8486 ..... 10, 13
p. 8586 12
p. 8587 ..... 11, 12, 23
pp. 8587-8588 ..... 13, 24
p. 8588 ..... 11, 12, 13, 32
p. 8589 ..... 11, 12, 23
p. 8590 ..... 11, 12
p. 8591 12
p. 8592 ..... 12, 23
pp. 8592-9593 12
p. 8593 ..... 13, 37
118 Cong. Rec. 31035-31036 (1972) 25
Digest of United States Practice in International Law (1978) 17
Diplomatic Immunities and Privileges: Foreign Affairs Committee, First Report, 1985, Cmnd. No. 9497 26
"Diplomatic Privileges and Immunities" (Harvard Research Draft), 26 Am. J. Int'l Law (Supp. 1932) 23
M. Farrand, *Records of the Federal Convention of 1787* (1966):
Vol. 1 21
Vol. 2 22-23
H.R. Conf. Rep. 99-783, 99th Cong., 2d Sess. (1986) 16
H.R. Rep. 1516, 75th Cong., 1st Sess. (1937) 11, 23

Miscellaneous—Continued: Page

H.R. Rep. 97-102, 97th Cong., 1st Sess. Pt. 1 (1981) 17
14 J. Continental Cong. 635 (1779) 20
21 J. Continental Cong. 1136-1137 (1781) 20
29 J. Continental Cong. 655 (1785) 20
1 J. Kent, *Commentaries on American Law* (7th ed. 1851) 11, 22, 30
1 Op. Att'y Gen.:
p. 26 (1792) 22
p. 41 (1794) 24
p. 52 (1794) 24
p. 71 (1797) 24
p. 74 (1797) 31
p. 141 (1804) 22
Preuss, *Protection of Foreign Diplomatic and Consular Premises Against Picketing*, 31 Am. J. Int'l L. 705 (1937) 22, 23
S. Doc. 696, 64th Cong., 2d Sess. (1917) 31
S. Rep. 1072, 75th Cong., 1st Sess. (1937) 10, 11, 23
S. Rep. 1105, 92d Cong., 2d Sess. (1972) 25
B. Sen, *A Diplomat's Handbook of International Law and Practice* (1979) 26
2 J. Story, *Commentaries on the Constitution* (2d ed. 1851) 20, 27, 30
Stowell, *Respect Due to Foreign Sovereigns*, 31 Am. J. Int'l L. 301 (1937) 23
The Federalist:
No. 3 (Jay) (C. Rossiter ed. 1961) 21, 25
No. 42 ((Madison) (C. Rossiter ed. 1961) 20, 23
No. 43 (Madison) (C. Rossiter ed. 1961) 27
No. 81 (Hamilton) (C. Rossiter ed. 1961) 22
E. Vattel, *The Law of Nations* (J. Chitty ed. 1859) 19, 21, 24, 30
Vienna Convention on Diplomatic Relations: Hearing on Exec. H Before the Subcomm. of the Senate Comm. on Foreign Relations, 89th Cong., 1st Sess. (1965) 25
7 M. Whiteman, *Digest of International Law* (1970) 26

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

D.C. Code § 22-1115 (1981) is designed to assure the security, dignity and peace of foreign missions in the District of Columbia and to promote reciprocal protection for United States missions abroad. The question of the constitutionality of Section 22-1115 therefore is of great importance to the United States.

STATEMENT

1. This case involves a facial First Amendment challenge to D.C. Code § 22-1115 (1981) (App., *infra*, 1a), which was enacted by Congress in 1938 (S.J. Res. 191, ch. 29, § 1, 52 Stat. 30) to regulate picketing and demonstrations directed against foreign embassies in the District of Columbia. As relevant here, Section 22-1115 makes it unlawful to "display any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party, or organization * * * or to bring into public disrepute [the] political, social, or economic acts, views, or purposes of any foreign government, party, or organization"

within 500 feet of a building used by a foreign government as its embassy, legation or consulate, or for other official purposes. Section 22-1115 further makes it unlawful "to congregate within 500 feet of any such building or premises, and refuse to disperse after having been ordered so to do by the police authorities of the said District."

2. Petitioners are three individuals who wish to carry placards critical of the policies of the governments of the Soviet Union and Nicaragua in front of the embassies of those governments. Petitioner Waller, for example, wishes to carry in front of the Nicaraguan Embassy a sign stating "STOP THE KILLING" (J.A. 7-8).[1] Petitioners, along with respondent Finzer, brought this action against the Mayor and other officials of the District of Columbia, seeking a declaratory judgment that Section 22-1115 is unconstitutional on its face and an injunction barring its enforcement (Pet. App. 5a). Respondents submitted uncontradicted declarations of State Department, Secret Service, and Metropolitan Police officials, attesting to the importance of Section 22-1115 in assuring security and respect for foreign missions and reciprocal protection for United States missions abroad (Pet. App. 5a-6a, 19a n.7; J.A. 16-30).

The district court granted respondents' motion for summary judgment (Pet. App. 105a-110a), relying upon *Frend* v. *United States*, 100 F.2d 691 (D.C. Cir. 1938), cert. denied, 306 U.S. 640 (1939), which likewise sustained Section 22-1115 against a First Amendment challenge (Pet. App. 106a). The court rejected petitioners' effort to avoid the controlling force of *Frend* by arguing that Section 22-1115 is not "content neutral." In the court's view, the line drawn by Section 22-1115 is reasonable because "[d]emonstrations in opposition to the policies of a foreign government are obviously more likely to result in violence against foreign personnel or property

[1] Petitioners also stated that they wished to congregate with two or more persons within 500 feet of the official buildings of foreign governments (J.A. 5, 8, 11).

than demonstrations in support of a foreign government" (*id.* at 108a-109a).

3. a. The court of appeals affirmed (Pet. App. 1a-54a). It first concluded that Section 22-1115 serves compelling interests in furtherance of Congress's express power "[t]o define and punish * * * Offences against the Law of Nations" (Art. I, § 8, Cl. 10). Based on an exhaustive analysis of historical materials, culminating in Article 22 of the Vienna Convention on Diplomatic Relations, Mar. 18, 1961, 23 U.S.T. 3227, the court reaffirmed its holding in *Frend* that Section 22-1115 is a proper implementation by Congress of the Nation's duty under international law to accord due respect to foreign diplomats and to take appropriate steps to protect foreign missions against intrusion or any disturbance of their peace or dignity (Pet. App. 8a-18a). The court found "highly pertinent" the uncontradicted declarations of the responsible Federal and District of Columbia officials describing the need for a buffer zone around foreign embassies for security purposes and the "sensitive foreign policy concerns" regarding reciprocal protection for United States missions abroad (*id.* at 18a; see *id.* at 18a-22a).

The court also found Section 22-1115 to be consistent with the First Amendment. The court stressed that Section 22-1115 "imposes only a very minor geographic limitation on speech," since petitioners may demonstrate against the policies of a foreign government anywhere in the District of Columbia except within 500 feet of its official premises, and may freely express their views by speech, on radio and television, or in print (Pet. App. 23a-26a). In rejecting the notion that petitioners nevertheless should be permitted to picket in front of an embassy in order to maximize their visibility, the court stated that there is no First Amendment "right to the backdrop most interesting to press photographers or television cameramen" (*id.* at 24a), and that petitioners' interest in confronting representatives of foreign governments with their criticisms is far less substantial than

the interest of others in demonstrating in front of the White House, the Capitol, or the Supreme Court. Shielding leaders of our government from public protest is "incompatible with our democratic structure," the court reasoned, but foreign ambassadors "have no similar obligation to be accessible to public attack, and our polity does not have the same interest in ensuring that they are" (*id.* at 23a).

Finally, the court held that although Congress is free to enact a broader statute prohibiting all picketing within the 500-foot area, the fact that Section 22-1115 is more narrowly drawn to bar only picketing that is critical of the target government does not render it invalid. The court questioned whether it was even necessary to scrutinize Section 22-1115 under First Amendment principles applicable to statutes that regulate speech on the basis of content, because here the statute is justified by the secondary effects of picketing on the security and dignity of the particular embassy, not by any "preferred view" of the United States Government regarding the subject matter (Pet. App. 38a-39a n.15, citing *City of Renton* v. *Playtime Theatres, Inc.*, No. 84-1360 (Feb. 25, 1986)). But the court held that Section 22-1115 is valid even if First Amendment principles governing content-based restrictions are applicable, because it is narrowly tailored to bar the conduct that most immediately threatens to impair the special status of foreign missions, while leaving other activity unregulated (*id.* at 26a-38a, 48a-51a).[2]

[2] The court also rejected petitioners' contention that the last clause of Section 22-1115—which makes it unlawful to congregate within the 500-foot area and refuse to disperse when so ordered—is unconstitutional because it does not contain standards defining when police officers may give a dispersal order (Pet. App. 40a-43a). The court explained that the authority of the police to order dispersal is directly tied to the purposes of Section 22-1115 as a whole, and therefore may be exercised "when the police reasonably believe that a threat to the security or peace of the embassy is present," but not "for reasons having nothing to do with the nearby embassy" (*id.* at 43a).

b. Judge Wald dissented (Pet. App. 55a-102a). She agreed with the majority that Congress constitutionally could bar all embassy-related demonstrations within 500 feet of an embassy in order to protect its security and dignity (*id.* at 90a-95a). However, Judge Wald believed that Section 22-1115 violates the First Amendment because it draws a "viewpoint-based" distinction between picketing opposed to and picketing in favor of the policies of the foreign government (Pet. App. 87a-91a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners ask this Court to invalidate, as unconstitutional on its face, a statute that imposes a modest geographical limitation on demonstrations against foreign governments in the District of Columbia. In so doing, they ask the Court to overturn almost 50 years of settled legal precedent and practical experience in the Nation's Capital.

As this Court repeatedly has recognized, "[j]udging the constitutionality of an Act of Congress is properly considered ' "the gravest and most delicate duty that this Court is called upon to perform," ' " and the "duly enacted and carefully considered decision of a co-equal and representative branch of our Government" is entitled to substantial deference. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985), quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981), and *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.). Especially is that so where, as here, the Act of Congress concerns the conduct of this Nation's foreign relations and difficult predictive judgments regarding the diplomatic responses of other nations. *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948). The First Amendment furnishes no basis for second-guessing Congress's considered judgment in this case.

D.C. Code § 22-1115 was enacted by Congress in 1938, at a time when events in Europe and the Far East placed in stark relief both the critical role of diplomatic

missions in facilitating intercourse and mutual protection among nations and the unique sensibilities and vulnerabilities of those missions in times of international tension. Immediately after it was enacted, Section 22-1115 was sustained by the D.C. Circuit against a First Amendment challenge in *Frend* v. *United States*, 100 F.2d 691 (1938). The court in *Frend* found that the statute's "reasonable and proper restrictions" were narrowly tailored to further an obligation under the Law of Nations to regard ambassadors with special respect and to protect a foreign mission against invasion or "any other act tending to disturb [its] peace or dignity" (*id.* at 693). This Court, without dissent, denied review of the court of appeals' ruling in *Frend*. 306 U.S. 640 (1939). Ever since, Section 22-1115 has been repeatedly sustained by the courts[3] and has operated reasonably and efficiently to accord respect and protection to foreign missions in the District of Columbia.

This accumulated experience shows that Section 22-1115 has a number of virtues. First, it supplies a clear rule to guide law-enforcement personnel and private individuals regarding the limitations on picketing and other demonstrations targeted at foreign embassies.[4] Indeed, in *Cox* v. *Louisiana*, 379 U.S. 559 (1965), this Court cited Section 22-1115 with approval for this very reason. The Court there observed that Section 22-1115 states an "express limitation" that proscribes "certain acts" within the specified 500-foot area (379 U.S. at 568 n.1), in contrast to the statute in *Cox*, which prohibited picketing "near" a courthouse and therefore required "a degree of on-the-spot administrative interpretation" to give precise scope to the prohibition in particular circumstances (*id.* at 568). The 500-foot line also serves as a readily ascertainable security perimeter for the Secret Service and Metropolitan Police in protecting premises that may be a focal point for hostile action.

[3] See Pet. App. 1a-54a; *Jewish Defense League, Inc.* v. *Washington*, 347 F. Supp. 1300 (D.D.C. 1972) (three-judge court); *Jews for Urban Justice* v. *Wilson*, 311 F. Supp. 1158 (D.D.C. 1970); see also *Zaimi* v. *United States*, 476 F.2d 511, 515-516 (D.C. Cir. 1973).

[4] During the 3½ years preceding this suit, there were 98 demonstrations directed against foreign embassies in the District of Columbia that were subject to the 500-foot rule under Section 22-1115 (J.A. 27-28).

From another perspective, the fixed buffer established by Section 22-1115 furnishes foreign diplomats with a special measure of certainty in their safe and quiet enjoyment of the diplomatic premises, which serve as a sanctuary in the midst of an unfamiliar environment. The resulting insulation from harassment or intimidation, whether real or apparent, frees the personnel of the mission to concentrate on the independent pursuit of diplomatic matters that are of mutual interest to their nation and ours. Enforcement of Section 22-1115 facilitates the diplomatic process in another way as well, because it is a mark of the respect this Nation has for the ambassador and the government he represents, and thereby contributes to the good will that is essential to the conduct of foreign affairs. Finally, the 500-foot rule serves as explicit and concrete evidence to the community of nations that the United States has fulfilled its "special duty" under Article 22(2) of the Vienna Convention by taking what Congress has determined to be "appropriate steps to protect the premises of [foreign] mission[s] against intrusion or damage and to prevent any disturbance of the mission[s] or impairment of [their] dignity." 23 U.S.T. at 3237. Fulfillment of that commitment in turn strengthens the position of the President and the Secretary of State in urging foreign governments to take appropriate steps to afford comparable protection to our missions abroad.

The declarations submitted in this case by the officials who are responsible for the protection of foreign embassies in the District of Columbia attest to the continued importance of the security and foreign policy concerns that led to the enactment of Section 22-1115. In

addition, the flagrant violation of international law that culminated in the seizure of the American Embassy in Tehran and the capture of our diplomatic personnel (see *Dames & Moore* v. *Regan*, 453 U.S. 654, 662, 676 (1981)) serves as a vivid reminder that it is imperative to remain punctilious in our respect for foreign missions at the "Seat of the Government of the United States" (Art. I, § 8, Cl. 17) and to strive to instill a reciprocal respect for diplomatic missions abroad.

The Constitution, in each of its first three Articles, manifests a firm commitment by the Framers to enable the United States to accord the requisite respect and protection to ambassadors and their diplomatic missions, a power that had been lacking under the Articles of Confederation. Thus, Article I confers on Congress the power to "define and punish * * * Offences against the Law of Nations" (Art. I, § 8, Cl. 10), which includes infractions against the rights of ambassadors. Article II provides that the President "shall receive Ambassadors and other public Ministers" (§ 3), which, under diplomatic practice, implied that the ambassador or public minister would have the usual privileges. And Article III confers original jurisdiction on this Court in "all Cases affecting Ambassadors, other public Ministers and Consuls" (Art. III, § 2, Cl. 2), both out of respect for the sovereigns they represent, and because of the impact such cases might have on the peace of the Nation. The Constitution itself therefore establishes the compelling nature of the governmental interest underlying Section 22-1115.

The First Amendment does not deprive Congress of the power to implement the United States' obligations under the Law of Nations by means of the modest limitations on picketing and congregating under Section 22-1115. The statute imposes no restriction on the freedom to express opinions through speech or the press, to conduct demonstrations against the policies of a foreign government anywhere in the District of Columbia except within the 500-foot buffer zone, or to use the streets and sidewalks within that zone for purposes unrelated to the foreign mission.

Basically, therefore, Section 22-1115 takes away no forum or opportunity to communicate that would exist without the presence of diplomatic representatives of foreign governments or their embassies. But they are here solely for the purpose of conducting diplomatic business, and a foreign embassy properly stands on the sidelines of the robust debate of public issues that the First Amendment was intended to protect. Indeed, the right of petition under the First Amendment itself does not extend to the presentation of grievances to a foreign government. By the same token, the Constitution and long-standing federal legislation contemplate that relations with foreign sovereigns will be conducted by the representatives of the people, not directly by the people themselves. Concomitantly, foreign diplomatic personnel have a reciprocal obligation under Article 41(1) of the Vienna Convention to deal directly with the Department of State and to refrain from interfering in the internal affairs of the United States.

Against this background, the constitutionality of Section 22-1115 follows *a fortiori* from *Cox* v. *Louisiana*, 379 U.S. 559 (1965), where the Court sustained a prohibtion against picketing near a court house, in order to protect the independence of the judicial process against similar threats of harassment or coercion and to prevent an appearance to the public that the targets of the picketing might be affected by such conduct. Nor is Section 22-1115 properly regarded as impermissibly "content-based" or "viewpoint-based," since its application does not depend upon any preference on the part of the United States government with respect to the subject of the demonstration or the viewpoint of the participants. In any event, Section 22-1115 is valid because it is narrowly tailored to serve the compelling interest in preventing the conduct that is most likely to undermine the independence of the foreign mission and provoke retaliatory measures, while at the same time preserving other avenues of expression.

ARGUMENT

SECTION 22-1115 OF THE DISTRICT OF COLUMBIA CODE IS CONSISTENT WITH THE FIRST AMENDMENT BECAUSE IT IS NARROWLY TAILORED TO FURTHER THE COMPELLING GOVERNMENTAL INTERESTS IN PROTECTING THE SECURITY, DIGNITY AND PEACEFUL ENJOYMENT OF FOREIGN MISSIONS IN THE DISTRICT OF COLUMBIA

A. SECTION 22-1115 WAS ENACTED TO SECURE THE INVIOLABILITY OF FOREIGN MISSIONS AND ENCOURAGE RECIPROCAL PROTECTION FOR UNITED STATES MISSIONS ABROAD, AND IT CONTINUES TO FURTHER THOSE PURPOSES

D.C. Code § 22-1115 is the product of a deliberate congressional judgment (i) that the narrowly tailored restrictions it imposes are necessary to address important security and foreign policy concerns associated with foreign embassies, and (ii) that those restrictions preserve adequate alternative means for the expression of opinions concerning the policies of foreign governments and other issues of public concern. That congressional judgment is confirmed by present-day circumstances, and it is entitled to substantial deference by this Court.

1. a. Secretary of State Cordell Hull recommended immediate passage of what is now Section 22-1115 in 1937 in response to complaints by representatives of foreign governments that "their missions are being interfered with by individuals and groups" (S. Rep. 1072, 75th Cong., 1st Sess. 2 (1937)).[5] He explained that "diplomatic officers are clothed with certain immunities under international law" in order "to allow governments

[5] The floor debates identified some of the incidents that had prompted the bill: pickets in front of the Italian embassy carrying banners stating "Mussolini murders babies"; groups of demonstrators chanting "Down with Mussolini"; picketers in front of the Polish Embassy protesting persecutions in Poland; and attempts by demonstrators to make speeches on the steps of the German and Italian embassies. 81 Cong. Rec. 8486 (1937).

to transact official business free from interruption which might flow from molestation of or interference with their representatives" (*ibid.*). He therefore urged that they be protected as well from "any attempted intimidation or coercion" associated with picketing (*ibid.*). Secretary Hull also stressed that "[t]he United States with its 338 diplomatic missions and consulates is, perhaps more than any other country, interested in obtaining for its representatives the protection which they must have if they are to function effectively" (*ibid.*). The latter consideration was presented with special urgency, because many United States citizens had at that time taken refuge in diplomatic compounds in China and were dependent for their safety upon whatever protection would be assured by the Chinese and Japanese Governments. 81 Cong. Rec. 8484-8485, 8587, 8590 (1937). Senator Pittman, the Chairman of the Foreign Relations Committee and the sponsor of the bill, insisted that "when we are appealing to the justice and the humanity of other governments to protect our embassies and our legations and our consulates, at least we must show some intent upon our part to treat their embassies and their consulates in our country the same way" (*id.* at 8485). See also S. Rep. 1072, *supra*, at 1-2; H.R. Rep. 1516, 75th Cong., 1st Sess. 1 (1937).

Senator Pittman also explained that the protection afforded by the bill was intended to implement obligations under international law to secure the inviolability of ambassadors and other diplomatic personnel, who are " 'requisite for negotiations and friendly intercourse' " (81 Cong Rec. 8587 (1937), quoting 1 J. Kent, *Commentaries on American Law* 45 (7th ed. 1851)). He observed that ambassadors "come here under special privileges" (81 Cong. Rec. 8587 (1937)) and "live as guests in this country" (*id.* at 8588; see also *Id.* at 8589), and that their embassies and legations are the "sanctuaries" within which they live and work (*id.* at 8587). The purpose of the bill, he stated, was to protect members of the mission "in the free and safe use and enjoyment of

their sanctuaries" (*ibid.*)—in order to avoid "harassment and annoyance of representatives of foreign governments" (*id.* at 8591) and apprehension among the diplomats and their families (*id.* at 8587; see also *id.* at 8589, 8591, 8592),[6] as well as to protect our diplomatic missions abroad from the risk of retaliation (*id.* at 8485, 8486, 8587, 8590). In addition, there was fear that demonstrations could embroil this country in internal disputes between political factions in other countries (*id.* at 8592-8593).

b. By the same token, Congress was sensitive to First Amendment values when it enacted Section 22-1115. Senator Pittman made clear that the measure was "not for the purpose of suppressing or subduing any expressions on the part of our people" (81 Cong. Rec. 8485 (1937)). He pointed out that people opposed to the policies of a foreign government "would have an absolute right to say as much in any newspaper" and "to say it in any speech whenever they wanted to" (*id.* at 8589); and he noted as well that "in a city as large as this, [there are] numerous parks and so many places in which societies may express their opinions" (*id.* at 8485). But he did not believe that "people who may make speeches which would not be subject to punishment if made in a park [should] be permitted to go to the front door of an embassy and make the same speeches" (*id.* at 8589; see also *id.* at 8588). Accordingly, Congress sought to impose limitations only to the extent necessary to preserve the security and dignity of the embassy, while permitting the nearby streets and sidewalks to be used for other activities. Senator Pittman stated, for example, that the statute had been drawn so as to permit "a perfectly peaceful parade down the street past an embassy, having nothing to do whatever with the embassy or the ambassador or the country which he represents," but to

[6] Senator Pittman observed that "some foreign representatives have found it necessary to move their families away from their official homes during such periods of picketing" (81 Cong. Rec. 8587 (1937); see also *id.* at 8592).

bar such conduct where "the very purpose of the parade [is] to criticize the ruler of some government or its ambassador or minister" (*id.* at 8484).[7]

Furthermore, Congress specifically considered and rejected an alternative to Section 22-1115 that would have permitted picketing but subjected it to regulation under an already-existing ordinance that barred disorderly assemblies on streets or in front of public buildings if offensive or abusive language might insult passersby. See 81 Cong. Rec. 8588, 8593 (1937). In opposing this alternative, Senator Barkley inquired (*id.* at 8592): "Does not the Senator recognize the difference between picketing a factory, or store, * * * and the picketing of an embassy or legation in the United States?" Congress ultimately agreed with the Attorney General and the Secretary of State that the proposed alternative was both insulting and inadequate, because it accorded diplomatic representatives no more respect than an ordinary passerby and because it did not protect them from having their government called into public odium "right in their faces" (*id.* at 8587-8588, 8593). See *Zaimi*, 476 F.2d at 519-522.[8]

[7] The remarks quoted in this sentence were made at a time in the debates when the basic prohibition was drafted in much broader terms that were not limited to picketing that was specifically directed to the foreign embassy. See 81 Cong. Rec. 8484 (1937). Under that early version, conduct that did not concern the embassy —such as the parade mentioned by Senator Pittman—would have been allowed only by means of a permit. See *ibid.* However, the Senate later substituted for this version the first clause of Section 22-1115 as finally enacted (*id.* at 8586, 8593), which altogether excludes from coverage any picketing that is not directed to the embassy, without the need to obtain a permit. Congress thereby eliminated any discretion the police otherwise might have had to either allow or prohibit signs and banners that were not directed to a foreign government. Compare *Kolender* v. *Lawson*, 461 U.S. 352, 357-361 (1983). Moreover, in *Frend*, the court construed Section 22-1115 to withhold from the police any discretion to grant permits for some demonstrations that oppose the policies of the foreign government. 100 F.2d at 694.

[8] We agree with the court of appeals that the second clause of Section 22-1115 should not be read to make it unlawful, within the

2. a. The record in this case confirms that the concerns that led Congress to enact Section 22-1115 remain substantial. In a declaration submitted in the district court, James Nolan, the Director of the Office of Foreign Missions (see 22 U.S.C. (& Supp. III) 4303), stated that Section 22-1115 is "essential to the foreign policy interests of the United States Government" (J.A. 24). He elaborated (*id.* at 25):

> Department of State Security Officers at our embassies abroad seek host government cooperation in establishing police-enforced demonstration proximity limits at maximum distances from American facilities. Most governments are forthcoming in granting these requests. In other countries where groups are permitted to demonstrate near American facilities, we have suffered the unfortunate consequences of personal injury and property damage. Any diminution in the zone of safety afforded foreign missions in this country could have an adverse impact upon the continued willingness of other governments to establish maximum buffer zones.

Similarly, the Assistant Secretary of State for Security, David Fields, stated that because the District of Columbia is the Nation's Capital, "[t]he security and respect accorded the large numbers of embassies and missions [here] are * * * given exceptionally close scrutiny by foreign governments" (J.A. 17). He also noted that international events can "create high emotions and sharp feelings against foreign countries and governments," which may cause demonstrations that begin peacefully to turn violent (J.A. 17-18). For this reason, Mr. Fields stated his opinion that the 500-foot buffer zone "is critical to the maintenance of effective security," since lesser protection could "vastly increase the risk * * * of injury or damage to protected persons or property due to any loss of crowd control" (J.A. 18-19).[9] The Special Agent in Charge of the Secret Service's protective operations further pointed out that at the White House and Vice President's residence, the Secret Service maintains a presence inside the structure and uses surveillance equipment to monitor the area between the building and the surrounding fence. By contrast, "Secret Service personnel are prohibited by international law and comity from entering onto the premises of a foreign embassy," and they therefore cannot maintain a command center in the

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500-foot buffer zone, to congregate and refuse to disperse where the congregation and the dispersal order have "nothing to do with the nearby embassy" (Pet. App. 43a). Rather, read in the context of the statute as a whole, as well as the special duty under Article 22(2) of the Vienna Convention that the statute implements, the second clause only addresses congregating that is reasonably believed to impair the security, dignity, or peace of the embassy. For example, the second clause bars congregating that is the functional equivalent of the display of signs barred by the first clause—*i.e.*, congregating (albeit without signs) that is "designed or adapted" to coerce, intimidate or harass the foreign government or its diplomatic personnel; to bring the foreign government "into public odium" or its policies into "public disrepute"; or to interfere with the "free and safe pursuit" of the diplomatic personnel's duties. Therefore, because the two clauses have essentially the same purpose, we discuss picketing and congregating (demonstrating) together in this brief.

[9] Mr. Fields cited the example of a demonstration near the Soviet Embassy by a group of Afghans protesting the Soviet invasion of Afghanistan. The demonstrators broke through police lines, but because of the 500-foot distance separating them from the Embassy, the police were able to reestablish control before they actually reached the building. "Had the distance separating the demonstrators from the Embassy been less," he observed, "property damage and personal injury to the embassy and its occupants might well have resulted[,] with potentially serious consequences for U.S. foreign relations and the security of U.S. personnel overseas" (J.A. 18). The Deputy Chief of the Metropolitan Police Department identified several other violent incidents of the sort that Section 22-1115 seeks to prevent: the temporary takeover and ransacking of the Iranian Interest Section of the Algerian Embassy on Wisconsin Avenue in 1981, during which a demonstrator was shot and other demonstrators and Interest Section personnel were injured; the temporary takeover of the Nicaraguan Embassy/Chancery on New Hampshire Avenue in 1978, during which two Secret Service officers were injured; and events in London involving the Syrian and Libyan Embassies (J.A. 29; see also J.A. 22).

compound or a defensive fall-back position inside its perimeter (J.A. 21-22).

b. Petitioners submitted no evidence in district court to contradict the foregoing declarations by officials who are responsible for the enforcement of Section 22-1115 and the protection of foreign embassies generally.[10] Furthermore, both courts below credited those uncontradicted declarations, finding them "highly pertinent to the compelling interests served by section 22-1115" (Pet. App. 18a; see also *id.* at 108-110a)). The record before this Court thus establishes the continuing force of the security and foreign policy interests underlying Section 22-1115, including its importance in the delicate task of encouraging other nations to assure reciprocal protection for United States missions abroad.[11] See also 22 U.S.C. 4306(d) (recognizing "[t]he international obligation of the United States to facilitate the provision of adequate and secure facilities for foreign missions in the Nation's Capital").

Far from responding to these very real concerns, petitioners appear almost to regard it as a virtue that their picketing might trigger adverse reactions from foreign governments or their people, for they invoke the proposition that speech may " 'best serve its high purpose when it induces a condition of unrest, * * * stirs people to anger,' " and " 'invites dispute' " (Br. 25 & n. 17, quoting *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949), and *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 64 (1976) (plurality opinion)). That proposition is singularly inapposite in this case. The quoted passages stand for the principle that the First Amendment's com-

[10] Contrary to the ACLU's contention (Amicus Br. 14-16), Congress did not, in Section 1302 of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 897, "renounce[]" any imperative federal interest in Section 22-1115. As the ACLU concedes, the Congress as a whole rejected the Senate bill's provision to repeal Section 22-1115. See H.R. Conf. Rep. 99-783, 99th Cong., 2d Sess. 88 (1986). Congress instead included in Section 1302 a statement of the sense of Congress that Section 22-1115 "may" be inconsistent with the reasonable exercise of the rights of speech and assembly and that the obligation to provide adequate security for foreign missions must be "balanced" against the exercise of those rights. These uncertain expressions obviously do not purport either to "renounce" the importance of protecting the security, dignity, and peace of foreign missions in Washington, or to repeal Section 22-1115. Indeed, Section 1302 further states the sense of Congress that "the Council of the District of Columbia should review and, *if appropriate*, make revisions in the laws of the District of Columbia concerning demonstrations near foreign embassies" (100 Stat. 897 (emphasis added)). Congress therefore has clearly not reached a concluded view that any "revision" of Section 22-1115 is "appropriate," much less the outright repeal that petitioners essentially seek by means of this facial challenge to the statute. To the contrary, even if the Council concluded that some revisions were warranted, Congress might ultimately disagree. Moreover, Section 1302(3) further states the sense of the Congress that the Council of the District of Columbia should undertake that review "in consultation with the Secretary of State and the Secretary of the Treasury," thereby recognizing the important foreign policy and security interests that would be implicated.

In connection with the District of Columbia Council's review of Section 22-1115, the Department of State, Department of Justice and the Secret Service have taken the firm position that Section 22-1115 should not be amended. For example, in a June 30, 1987, letter to the Chairman of the Council of the District of Columbia, the Secretary of State stated that the protection of foreign embassies is of "vital importance" to his Department; that the United States "takes * * * seriously" its obligation under Article 22(2) of the Vienna Convention to protect the security, peace and dignity of foreign missions and "expects other governments to do the same"; and that he is "deeply concerned" about elimination of the "500-foot rule" in Section 22-1115, since "[s]uch a change, at the very time when we are urging other governments to increase security for our diplomats abroad, could place our diplomats at risk" (App., *infra*, 2a-3a).

[11] The importance of reciprocity, which underlies all relations between nations, is recognized in the positive law of the United States. Of particular relevance here, it is embodied both in Article 47 of the Vienna Convention (23 U.S.T. at 3248-3249) and in the Acts of Congress that specifically address the privileges and immunities of diplomatic personnel and the location of foreign missions in the United States. See 22 U.S.C. (& Supp. III) 254c, 4304(b); H.R. Rep. 97-102, 97th Cong., 1st Sess. Pt. 1, at 25-29 (1981); *Digest of United States Practice in International Law* 108-109 (1978).

mitment to robust debate among the people of the United States cannot be defeated because of the sensibilities of the audience. Here, however, the immediate impact of petitioners' picketing or demonstrations in front of a foreign embassy would be felt not by their fellow citizens, but by the accredited diplomatic representatives of a foreign sovereign. Congress has determined that such conduct is indeed likely to "invite[] dispute"—but between the United States and the foreign government concerned. And Congress has determined that such conduct is indeed likely to "stir[] people to anger"—but in a foreign country, where our diplomatic personnel and other citizens might be endangered. There is a compelling interest in preventing that from happening.

The United States, in fact, may be especially vulnerable to such retaliatory measures, because its highly visible presence abroad makes its diplomatic and consular missions an attractive focal point for those opposed to this Nation's policies. And because many other nations and their people are particularly sensitive to assaults on their dignity, retaliatory measures abroad may be out of all proportion to the offending conduct in the United States. " 'Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.' " *Zschernig* v. *Miller*, 389 U.S. 429, 441 (1968) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 64 (1941)). As we shall now show, the Constitution confers upon Congress the necessary authority to prevent such provocations.

B. SECTION 22-1115 SERVES COMPELLING GOVERNMENTAL INTERESTS GROUNDED IN THE CONSTITUTIONAL PROVISIONS THAT COMMAND RESPECT FOR THE LAW OF NATIONS AND THE RIGHTS OF AMBASSADORS

1. The United States Constitution was adopted against the background of a widely shared recognition that relations among nations must be governed by certain fundamental principles—comprising the Law of Nations—that are to be respected, given content, and enforced by each nation within its territory. One of the primary subjects addressed by the Law of Nations concerned the special status, rights, and immunities of ambassadors. These attributes evolved from the obvious truth that although "[i]t is necessary that nations should treat and hold intercourse together," they practicably can do so only through ambassadors and other public ministers. E. Vattel, *The Law of Nations* 452 (J. Chitty ed. 1859. Vattel explained the necessary corollary to this proposition (*id.* at 463):

> The respect which is due to sovereigns should redound to their representatives * * *. Whoever offends and insults a public minister commits a crime the more deserving of severe punishment, as he might thereby involve his country and his sovereign in very serious difficulties and trouble.

The respect owing an ambassador, and the corresponding insulation of him from offense and insult, had a significant functional justification as well: if the ambassador was not secure and independent from local restraints and affronts, he could not adequately serve the distant sovereign he represented, especially where his task might be unpopular. E. Vattel, *supra*, at 464, 470-471; *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 137-139, 143 (1812).

For these reasons, the Law of Nations had long recognized that an ambassador is entitled to certain privileges and immunities attaching to his station. These included the personal "inviolability" of the ambassador, his immunity from the jurisdiction of the receiving nation, and the free exercise of his religion. E. Vattel, *supra*, at 464, 470-471, 477, 482-483, 488-489. The ambassador's immunity also extended to his retinue and property, "in order to enable him to live with dignity, and quietly to attend to the discharge of his functions" (*id.* at 492; see also *id.* at 496-497). The independence and inviolability

of the ambassador required like protection for his house, which was "to be safe from all outrage" (*id.* at 494-495).[12]

2. In the period immediately following the Declaration of Independence, the Continental Congress sought to assure the world that the "law of nations [would be] strictly observed" by the United States (14 J. Continental Cong. 635 (1779)). But, as James Madison later observed in *The Federalist* No. 42, at 265 (C. Rossiter ed. 1961), the Articles of Confederation "contain[ed] no provision for the case of offenses against the law of nations; and consequently [left] it in the power of any indiscreet member to embroil the Confederacy with foreign nations." The Continental Congress therefore found it necessary on several occasions to urge the States to enact legislation to protect ambassadors and to honor the law of Nations.[13]

The imperfect ability of the United States under the Articles of Confederation to speak forcefully and with one voice in the area of foreign affairs was one of the

[12] The sensibilities of a nation offended by a failure to respect the immunities of an ambassador were well illustrated by a notorious event in the early Eighteenth Century, in which "an arrest of the Russian ambassador in a civil suit in England, in the reign of Queen Anne, was wellnigh bringing the two countries into open hostilities," until England made a "humiliating" atonement (2 J. Story, *Commentaries on the Constitution* § 1659, at 434 (2d ed. 1851)).

[13] The Continental Congress adopted a resolution in 1781 calling on the States to enact laws punishing infractions against the law of nations, including "infractions of the immunities of ambassadors and other public ministers, authorised and received as such by the United States in Congress assembled" (21 J. Continental Cong. 1136-1137). In particular, Congress recommended enactment of measures protecting ambassadors against "violence offered to their persons, houses, carriages and property" and "disturbance given to the free exercise of their religion" (*id.* at 1137). Again in 1785, the Continental Congress directed the Secretary of Foreign Affairs to draft an act to be recommended to the States "for securing the privileges and immunities of public Ministers from foreign powers" (29 J. Continental Cong. 655).

principal defects leading to the adoption of the Constitution. It was regarded as a matter "of high importance to the peace of America that she observe the laws of nations," and it was anticipated that this would be "perfectly and punctually done" by the new national government (*The Federalist* No. 3, at 43 (Jay) (C. Rossiter ed. 1961)). The Framers were particularly intent upon securing respect and protection for the status and privileges of ambassadors—a purpose set forth in each of the first three Articles of the Constitution.

Article I expressly grants Congress the power to "define and punish * * * Offences against the Law of Nations" (Art. I, § 8, Cl. 10). This provision was specifically designed to cure the defect in the Articles of Confederation that had prevented Congress from, inter alia, protecting against invasions of "the rights of an ambassador" (1 M. Farrand, *Records of the Federal Convention of 1787*, at 25 (1966)).

Article II contemplates that the President personally "shall receive Ambassadors and other public Ministers" sent by foreign nations (Art. II, § 3), a responsibility that engages an obligation on the part of this Nation to respect the ambassador or minister and the government he represents. In fact, under established practice at the time the Constitution was adopted, the consent to receive an ambassador implied a consent that he would possess the usual privileges (*The Schooner Exchange*, 11 U.S. (7 Cranch) at 139), as well as an undertaking "to grant him the most particular protection" (E. Vattel, *supra*, at 465).

Article III manifests an exacting solicitude for representatives of foreign sovereigns by providing that "The judicial Power shall extend * * * to all Cases affecting Ambassadors, other public Ministers and Consuls" (Art. III, § 2, Cl. 1). Indeed, Article III commits such cases to this Court's original jurisdiction (Art. III, § 2, Cl. 2), "out of respect for the sovereignties they represent" and because "[a]ll questions in which they are concerned

are so directly connected with the public peace" (*The Federalist* No. 81, at 487 (Hamilton)).[14]

It is unmistakably clear from the text and purposes of these three provisions of the Constitution that the Framers intended to vest the federal government with full authority to assure respect for the safety and dignity of ambassadors and other public ministers who are sent by foreign nations and received by the President. The First Congress promptly acted to secure certain of these protections,[15] and the immunities of foreign ministers and their dwellings and retinues were immediately "recognised by the United States in their fullest extent" (1 Op. Att'y Gen. 141, 143 (1804); see *id.* at 26, 28 (1792); 1 Kent, *supra*, at 46-47); see also *Respublica* v. *Keating*, 1 Dall. 111, 117 (Oyer. & Term. Pa. 1784).

3. The limited regulation of picketing and congregating under D.C. Code § 22-1115 (1981) falls squarely within the deliberately broad constitutional powers conferred on Congress in this area. As one commentator observed while the bill was pending before Congress, "the [practice of] picketing foreign official premises [was] of recent origin" (Preuss, *Protection of Foreign Diplomatic and Consular Premises Against Picketing*, 31 Am. J. Int'l L. 705, 708 & n.10 (1937)). But Congress surely had the power to address this new threat to the special status of foreign missions and the fulfillment of the diplomatic function. In fact, the provision for Congress to "define" as well as "punish" offenses against the Law of Nations (Art. I, § 8, Cl. 10) was included for the very purpose of enabling it to prescribe new offenses that did not have precise counterparts in the past practice of the United States or other nations. See 2 Farrand, *supra*,

[14] See also *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 175 (1803) (this original jurisdiction stems from "the solicitude of the convention, respecting our peace with foreign powers"); *Ames* v. *Kansas*, 111 U.S. 449, 464 (1884).

[15] See Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 80; Act of Apr. 30, 1790, ch. 9, §§ 25, 26, 28, 1 Stat. 117-118.

at 316, 614-615; *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 159 (1820); cf. *The Federalist* No. 42, at 265-266 (Madison).

In the judgment of Congress in 1938, the prohibition against picketing and congregating in the immediate vicinity of a foreign embassy or other official premises was necessary to prevent impairment of the inviolability of the premises, as well as to further the ultimate purpose of all diplomatic privileges and immunities—to enable diplomatic personnel to pursue their duties without fear, personal affront, interruption, or intimidation, whether real or apparent. S. Rep. 1072, *supra*, at 2; H.R. Rep. 1516, *supra*, at 1; 81 Cong. Rec. 8587, 8589, 8592 (1937) (remarks of Sen. Pittman).[16] These are unquestionably governmental interests of the highest order, and they amply justify the modest geographic limitation on picketing and demonstrations that Congress deemed required to create a buffer or transition zone between the inviolable premises of the diplomatic mission and the ordinary streets and sidewalks beyond.[17]

[16] Congress's perception of the threat and its judgment regarding the appropriate response had the support of contemporary commentators. See, *e.g.*, Preuss, *supra*; Stowell, *Respect Due to Foreign Sovereigns*, 31 Am. J. Int'l L. 301 (1937). In sustaining Section 22-1115 in 1938, the D.C. Circuit in *Frend* also cited (100 F.2d at 693 n.3) the Harvard Research Draft on "Diplomatic Privileges and Immunities," which had formulated a general duty of receiving states to "protect the premises occupied or used by a mission * * * against any invasion or other act tending to disturb the peace or dignity of the mission" (26 Am. J. Int'l Law 50 (Supp. 1932)). The commentary to the Harvard Research Draft stated that the provision not only contemplated protection against physical intrusion and against crowds who were collected in the vicinity to "express abuse, contempt or even disapprobation of the sending state or its mission"; but also that a similar duty "would seem to exist to protect such premises against so-called 'picketing,' this being an act tending to disturb the peace and dignity of the mission" (26 Am. J. Int'l Law Supp. at 709).

[17] As the court below observed (Pet. App. 9a-11a), earlier expressions also lend support to Congress's determination in 1938 that the protection for ambassadors and diplomatic missions should

Moreover, the foundation for Section 22-1115 in the Law of Nations has been confirmed by the Vienna Convention. Article 22(2) of the Convention provides that the receiving state "is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity." This provision does not explicitly address the question of picketing and other demonstrations in the vicinity of a foreign mission. Nor is there any occasion here to decide whether Article 22(2) in itself imposes a mandatory duty on the signatory states to prohibit some or all such activity within some area surrounding an embassy. For, whatever the answer to that question, the limited restrictions imposed by D.C. Code § 22-1115 are unquestionably "appropriate steps" for this Nation to take in the implementation and enforcement of Article 22(2) within the United States. Compare U.S. Const. Amends. XIII, § 2; XIV, § 5; and XV, § 2 (Con-

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extend beyond the prevention of physical harm and should encompass as well verbal "insults" of the countries they represent that are delivered "right in their faces" (81 Cong. Rec. 8587-8588 (1937)). See E. Vattel, *supra*, at 464 (emphasis added) ("Whoever offends and *insults* a public minister commits a crime the more deserving of severe punishment"); 1 Op. Att'y Gen. 41-42 (1794) (emphasis added) (indicating that violation would occur where "persons tumultuously assembled before the house of a foreign [minister], requiring him to deliver up certain persons supposed to be resident with him, and *insulting* him with improper language"); 1 Op. Att'y Gen. 52 (1794) (emphasis added) ("in the case of a foreign public minister, the municipal law [of libel] is strengthened by the law of nations, which secures the minister a peculiar protection, not only from violence, but also from *insult*"); 1 Op. Att'y Gen. 71, 72-73 (1797) (emphasis added) ("An affront to an ambassador is just cause for national displeasure, and * * * it is usual [for nations] to complain of *insults* to their ambassadors"); *United States* v. *Hand*, 26 Fed. Cas. 103, 104-105 (C.C.D. Pa. 1810) (No. 15,297) (emphasis added) (protection is given to an ambassador's house in order "to guard him, as well against *insults*, as real personal injury"); see also *Respublica* v. *Keating*, 1 Dall. at 117 (the minister's house "is to be defended against all outrage; it is under a peculiar protection of the laws; to invade its freedom is a crime against the State and all other nations").

gress shall have the power to "enforce" those Articles by "appropriate" legislation); *City of Rome* v. *United States*, 446 U.S. 156, 173-178 (1980).[18] "A right secured by the laws of nations * * * is one the United States * * * are bound to protect" (*United States* v. *Arjona*, 120 U.S. 479, 487 (1887)). The measures Congress has deemed appropriate to protect the rights secured to ambassadors by the Law of Nations therefore serve a compelling national interest, because it is a matter "of high importance to the peace of America that she observe the law of nations" (*The Federalist* No. 3, at 43) (Jay).[19]

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[18] Section 22-1115 implements Article 22(2) in two ways: (i) it directly promotes the peace and dignity of the mission premises and the diplomatic personnel's quiet use and enjoyment of them; and (ii) by establishing a buffer to guard against potential violence, it "protect[s] the premises of the mission against any intrusion or damage." When the Vienna Convention was before the Senate, the State Department's description stated that the Article 22(2) "duty of protecting the premises of a diplomatic mission against intrusion, damage, and disturbance of the peace is reflected in Section 22-1115 of the District of Columbia Code" (*Vienna Convention on Diplomatic Relations: Hearing on Exec. H Before the Subcomm. of the Senate Comm. on Foreign Relations*, 89th Cong., 1st Sess. 49 (1965)).

Congress enacted the Diplomatic Relations Act of 1972 (86 Stat. 1072) to facilitate implementation of the Convention in other respects. Congress included in that Act certain protections for foreign officials (18 U.S.C. 112(b), discussed at note 19, *infra*) and a restriction against certain picketing of foreign official premises outside the District of Columbia (18 U.S.C. (Supp. III 1973) 112(c)). The latter provision was not extended to the District of Columbia because D.C. Code § 22-1115 (1981) already regulated such picketing. See S. Rep. 1105, 92d Cong., 2d Sess. 19 (1972); 118 Cong. Rec. 31035-31036 (1972). Congress repealed the special picketing provision applicable outside the District of Columbia in 1976, in order to allow greater latitude for freedom of expression (Pub. L. No. 94-467, § 5, 90 Stat. 1999; see Pet. App. 56a-57a n.1 (Wald, J., dissenting)), but Congress did not repeal D.C. Code § 22-1115.

[19] Under Article 22(2) of the Convention, each receiving state must determine the "appropriate" steps to be taken to implement the Convention's central protections, in light of that state's own circumstances, experience, and legal structure. It is therefore irrelevant that other nations have not taken identical approaches to the

regulation of picketing near foreign missions. See Pet. Br. 32-33; ACLU Amicus Br. 25-27. For example, although petitioners and the ACLU rely on the absence of a flat ban on picketing near embassies in London, in most cases the conduct of demonstrations there is committed to the discretion of the police and participants are kept at a distance, on the far side of the street. *Diplomatic Immunities and Privileges:* Foreign Affairs Committee, First Report, 1985, Cmnd. No. 9497, at 17. In this country, by contrast, there may be some reluctance to confer comparably broad discretion on police officers (see, *e.g., City of Houston* v. *Hill*, No. 86-243 (June 15, 1987), slip op. 13), and a fixed perimeter may therefore be more "appropriate." See B. Sen, *A Diplomat's Handbook of International Law and Practice* 97-98 (1979) (noting that if demonstrations cannot be prevented, the government should "prescribe a certain area around the mission premises in which such demonstrations will not be permitted"). Similarly, the receiving state may choose to rely on strict enforcement of generally applicable police regulations to fulfill its obligations under Article 22(2), rather than to enact a special statute. See, *e.g.*, 7 M. Whiteman, *Digest of International Law* 385 (1970) (noting amendment of bylaws by Ottawa City Council "to give police greater authority to curb public demonstrations, notably, though not specifically mentioned, those at diplomatic missions").

Petitioners and the ACLU err in relying (Pet. Br. 29-30; ACLU Amicus Br. 18, 24) on 18 U.S.C. 112(b), which imposes somewhat less restrictive limitations on demonstrations outside the District of Columbia, for the proposition that D.C. Code § 22-1115 exceeds the scope of the United States' proper responsibilities under the Convention. As the court below observed, 18 U.S.C. 112(b) is not the only source of protection for premises elsewhere in the country, because "Congress relies to some extent on the state and local governments to provide whatever additional measures are necessary to protect foreign nationals, aware perhaps that security needs may differ from state to state" (Pet. App. 25a n.9); see also *Concerned Jewish Youth* v. *McGuire*, 621 F.2d 471, 475 (2d Cir. 1980), cert. denied, 450 U.S. 913 (1981).

In any event, the difference between the two approaches is readily explainable by the greater concentration of foreign missions in the District of Columbia; the presence here of the *embassies* of all foreign nations, which, unlike consulates and similar missions elsewhere, embody the symbolic political presence of the sending State in our territory; and the additional security requirements attributable to the status of embassies and of this Nation's Capital (Pet. App. 25a n. 9). See 3 U.S.C. 202. The difference of course also reflects the fact that, under the Constitution, Congress has exclusive legislative jurisdiction over the District of Columbia

C. THE NARROWLY TAILORED RESTRICTIONS IN SECTION 22-1115 ARE CONSISTENT WITH THE FIRST AMENDMENT

The First Amendment does not deprive Congress of the power to protect the security, dignity, and peaceful enjoyment of diplomatic missions by means of the modest limitations on picketing and congregating contained in Section 22-1115. To the contrary, especially in light of the unique status of diplomatic missions recognized by the Constitution itself, Section 22-1115 is well within the scope of permissible regulation under the First Amendment.

1. As Senator Pittman, the principal sponsor, made clear during the legislative debates, the enactment of Section 22-1115 was "not for the purpose of suppressing or subduing any expressions on the part of our people" (81 Cong. Rec. 8485 (1937)). Nor does Section 22-1115 have a significant effect on freedom of expression. Petitioners and others are entirely free to express their views on any subject in their own speech, in the press, or the broadcast media; they may conduct demonstrations in opposition to the policies of the Soviet Union, Nicaragua, or any other nation anywhere in the District of Columbia, except within 500 feet of the official premises of the government concerned; and even within that area, petitioners and others are free to use the streets and sidewalks for a broad range of conduct, including picketing that is unrelated to the foreign mission whose status is specifically protected. All Congress has prohibited within the 500-foot zone is certain conduct addressed to the embassy itself: demonstrations or picketing designed or adapted either to intimidate or harass the foreign government or its diplomatic representatives, or to call that

(Art. I, § 8, Cl. 17; see 2 J. Story, *supra*, § 1219, at 116; *The Federalist* No. 43, at 272 (Madison)), while in the States any federal legislation would overlap with existing state law. Congress therefore may find it more "appropriate" under Article 22(2) of the Vienna Convention to legislate comprehensively for the District of Columbia.

government into public odium or disrepute. Petitioners contend that the First Amendment does not permit Congress to bar even this conduct. But they wholly fail to appreciate the significance of the fact that the most immediate target of their proposed conduct would be the diplomatic representatives of a foreign government.

2. The purpose of a foreign embassy in the District of Columbia is not to participate in or to be a staging ground for domestic political demonstrations and debate. Its purpose is to support the ambassador and other mission personnel in their official diplomatic dealings with the United States Government. That discourse is not conducted in the public arena, and it is severed from the political process. Moreover, the unique status of ambassadors and diplomatic missions under the Constitution strongly supports the conclusion that the First Amendment does not prohibit Congress from interposing a certain distance between American citizens and the official representative of a foreign sovereign.

a. A basic premise of petitioners' argument is that just as the people have the right to picket or demonstrate before a legislature (Br. 9, citing *Edwards* v. *Louisiana*, 372 U.S. 229, 235 (1963)) and the White House (Br. 17), which are the "political branches" of government (Br. 21), they also have the right to picket or demonstrate before the embassy of a foreign government (Br. 21, 25). The two situations, however, are very different.

In the first situation, the activity is addressed to an organ of domestic government, either federal or state. Such conduct directly implicates core First Amendment values. Indeed, in *Edwards* v. *Louisiana*, the Court stated that the individuals involved had "peaceably assembled at the site of the State Government" and there "peaceably expressed their grievances" (372 U.S. at 235) —conduct squarely covered by the Petition Clause of the First Amendment. And more generally, the " 'opportunity for free political discussion' " protected by the First Amendment serves " 'the end that government may be responsive to the will of the people' " (*New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964), quoting *Stromberg* v. *California*, 283 U.S. 359, 369 (1931)). In this sense, " 'speech concerning public affairs is more than self-expression; it is the essence of self-government' " (*Connick* v. *Myers*, 461 U.S. 138, 145 (1983), quoting *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964)).

Picketing before the embassy of a foreign government has a different character under the First Amendment. It is self-evident that a foreign embassy occupies no place in the domestic political structure established by the Constitution, and the embassy therefore is properly on the sidelines of the robust debate that is the essence of self-government under that structure. The First Amendment itself reflects this detachment, for appeals to a foreign government necessarily are excluded from the right of the people to petition "the Government"[20]—the right most directly implicated in cases, such as *Edwards* v. *Louisiana*, in which the people appeal directly to governmental authority. These considerations drawn from the First Amendment itself undermine the notion that that Amendment must be construed to bar Congress from prescribing a narrow buffer zone that separates a foreign embassy from private citizens who are seeking to present their grievances against that embassy's government by means of picketing and demonstrations.

b. Other aspects of the constitutional structure reinforce this conclusion. First, as we have explained (see pages 20-22, *supra*), the first three Articles of the Constitution manifest a firm intention on the part of the Framers to protect the privileged status and special immunities of ambassadors and their premises. The purpose of this is to assure diplomatic agents "independency" from the legal institutions of the receiving state that could undermine their resolve and loyalty to a distant sovereign. See *The Schooner Exchange*, 11 U.S. (7

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[20] See *Laker Airways Ltd.* v. *Pan American World Airways*, 604 F. Supp. 280, 287 (D.D.C. 1984); *Australia/Eastern U.S.A.* v. *United States*, 537 F. Supp. 807 (D.D.C. 1982); *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92, 108 (C.D. Cal. 1971), aff'd, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972).

Cranch) at 139, 143; E. Vattel, *supra*, at 464, 469-471, 491, 494-495; 2 J. Story, *supra*, § 1658, at 432. Indeed, at the time the Constitution was adopted, the ambassador's unique status often was explained by the "political fiction" that he was "extraterritorial, and therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides" (*The Schooner Exchange*, 11 U.S. (7 Cranch) at 138). See also 1 Kent, *supra*, at 46 ("By fiction of law, an ambassador is considered as if he were out of the territory of the foreign power."). Like many legal fictions, this theory metaphorically conveys a fundamental truth: that a foreign ambassador and his embassy stand outside of our society and are independent of its legal and political institutions. The First Amendment was adopted only a short time after these attributes of diplomatic status were expressed in the Constitution itself. There accordingly is no reason to believe that the First Amendment was intended to divest Congress of the power to take these same attributes of diplomatic status into account in prescribing a statutory rule of "immunity" from picketing and demonstrations in the immediate vicinity of a foreign mission in the Nation's Capital—conduct that, like others addressed by diplomatic immunities, could undermine the independence of diplomatic personnel by exposing them to the potential for intimidation, harassment, and affront.

It also is instructive that the Constitution unmistakably contemplates that relations with representatives of foreign governments will be conducted not by the people directly, but by the representatives of the people. Under the Constitution, it is the President who receives a foreign ambassador, a function that is but a particular manifestation of the President's status as the "'sole organ of the nation in its external relations'" (*United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), quoting 10 Annals of Cong. 613 (1800) (remarks of John Marshall)), even where the rights of individuals are directly affected. See *Dames & Moore* v. *Regan*, *supra*. As a result, although Congress of course retains

its proper legislative role in this area, diplomatic communications with a foreign government remain the exclusive responsibility of the Executive Branch. Congress recognized early in the Nation's history, when it enacted the Logan Act (Act of Jan. 30, 1799, ch. 1, 1 Stat. 613), that attempts by private citizens to intervene directly with foreign sovereigns could have unfortunate consequences for the Executive's conduct of foreign relations.[21] Here, Congress similarly concluded that private picketing and demonstrations directly in front of a foreign embassy in the Nation's Capital present a substantial potential for disrupting the conduct of foreign affairs.

c. It is significant as well that the members of a foreign mission in the United States have reciprocal obligations that serve to divorce them from political controversy within the United States. Article 41(2) of the Vienna Convention provides that the official business entrusted to a diplomatic mission "shall be conducted with or through the Ministry for Foreign Affairs of the receiving State"—in this country, the Department of State. See 22 U.S.C. 2656; Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28. Article 41(1) provides that all persons enjoying diplomatic privileges and immunities in the receiving State "have a duty not to interfere in the internal affairs of that State." Similar obligations were recognized early in the Nation's history. See 1 Op. Att'y Gen. 74, 75 (1797) ("[a] foreign minister here is to correspond with the Secretary of State on matters which interest his nation," and he "has no authority to communicate his sentiments to the people of the United States").

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[21] The Logan Act, now codified at 18 U.S.C. 953, makes it unlawful for a citizen of the United States to carry on correspondence or intercourse with a foreign government, or any officer or agent thereof, with the intent to influence the measures of a foreign government in relation to disputes or controversies with the United States or to defeat the measures of the United States. See S. Doc. 696, 64th Cong., 2d Sess. 1-11 (1917); *Waldron* v. *British Petroleum Co.*, 231 F. Supp. 72, 89 n.30 (S.D.N.Y. 1964); cf. *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 356 (1909).

d. We of course do not suggest that petitioners and others are not constitutionally entitled to engage in open and robust debate of public issues facing the Nation merely because those issues happen to involve foreign governments or their policies. We suggest only that the recognized independence of an ambassador and his mission from domestic institutions strongly supports the conclusion that the First Amendment does not bar Congress from interposing a modest geographic separation between the embassy of a foreign government and one of the forums—the public streets and sidewalks—in which the Nation's public debate takes place. That is all Section 22-1115 does. It merely prevents demonstrations or picketing in the immediate vicinity of a foreign embassy that would directly confront diplomatic personnel with criticism of their government "right in their faces" (81 Cong. Rec. 8588 (1937) (remarks of Sen. Pittman)).

Petitioners insist that what is at issue here is "pure speech" (see Pet. Br. 21; see *id.* at 13-16). But that obviously is incorrect. Section 22-1115 bars picketing and congregating; it therefore is not concerned "with free speech alone, but with expression mixed with particular conduct." *Cox* v. *Louisiana*, 379 U.S. 559, 564 (1965). "[W]here speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests." *City of Los Angeles* v. *Preferred Communications, Inc.*, No. 85-390 (June 2, 1986), slip op. 6. That is especially so where, as here, the competing social interests derive directly from explicit provisions of the Constitution itself. Petitioners rely on the proposition that public streets and sidewalks, " 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions' " (Pet. Br. 8, quoting *Hague* v. *CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.)). But it is equally true that, time out of mind, the premises occupied by diplomatic representatives (which here are immediately adjacent to those streets and

sidewalks) have been regarded as inviolable and entitled to special respect and protection. And just as First Amendment freedoms need "breathing space" if they are to survive (*NAACP* v. *Button*, 371 U.S. 415, 433 (1963)), so too may diplomatic missions and their personnel in a foreign land constitutionally be afforded a limited measure of breathing space for the performance of their delicate functions (which are mutually beneficial to both nations). The balance Congress struck in Section 22-1115 between these competing considerations is clearly legitimate under the First Amendment.

e. In light of the foregoing considerations, the constitutionality of Section 22-1115 follows *a fortiori* from *Cox* v. *Louisiana*, 379 U.S. 559 (1965), and in fact the Court there cited Section 22-1115 with approval. *Id.* at 568 n.1. In *Cox*, the Court sustained a state statute that prohibited picketing or parading on public streets and sidewalks "near" a courthouse—which the Court believed could embrace the area "within the sight and hearing of those * * * inside the courthouse" (*id.* at 568, 571-572). The Court held that "[t]here can be no question that a State has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create," in order to ensure that the administration of justice is "unhindered" and "free from outside control and influence" (*id.* at 562) and to "protect the judicial process from being misjudged in the minds of the public" (*id.* at 565).[22]

The interests supporting Section 22-1115 are similarly compelling. As Congress found in 1938, picketing and

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[22] In *United States* v. *Grace*, 461 U.S. 171, 182-183 (1983), the Court recognized the importance of the interest in maintaining the appearance of judicial independence. However, it invalidated a prohibition against carrying signs on the Supreme Court grounds insofar as it applied to the public sidewalks on the perimeter, because the statute imposed a "total ban" on carrying any signs (*id.* at 182), and therefore was not tailored to picketing that concerned a case pending before the Court (*id.* at 187 (Marshall, J., concurring in part and dissenting in part)).

demonstrations directed to and in the immediate vicinity of an embassy could undermine the independence of the embassy personnel, a consequence that the United States attempts to prevent in foreign capitals by prohibiting it in the District of Columbia. And, as Congress also recognized, there is a strong governmental interest in protecting against even the *appearance* that attempts are being made to influence diplomatic representatives or their government by picketing or demonstrations in the immediate victinity of the mission premises.

3. a. Contrary to petitioners' further submission, under *City of Renton* v. *Playtime Theatres, Inc.*, No. 84-1360 (Feb. 25, 1986), Section 22-1115 is not properly regarded as either "content-based" or "viewpoint-based" for purposes of First Amendment analysis. In *Renton*, the Court sustained an ordinance that required an adult motion picture theatre to be separated by at least 1,000 feet from any church, school, or residential zone. The Court found that the ordinance was "aimed not at the *content* of the films shown" but "at the *secondary effects* of such theaters on the surrounding community" (slip op. 5 (emphasis in original)). The Court therefore found the ordinance to be "completely consistent with [its] definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech'" (*id.* at 6, quoting *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

Similarly here, Section 22-1115 merely requires that picketing and demonstrations directed against a foreign government must be separated by 500 feet from that government's official premises. This requirement applies to *all* embassies and buildings occupied by foreign governments in the District of Columbia, irrespective of the views of the United States toward that government or its policies. Furthermore, Section 22-1115 applies *without regard* to the subject matter of any particular incident of picketing or congregating and *without regard* to the viewpoint of the participants. In other words, the statute is in no way based on any preference of the United States

Government regarding the position petitioners or any other persons wish to espouse.[23] Instead, Section 22-1115 is justified entirely on the basis of the "secondary effects" to which such picketing or congregating might give rise, as a result of its impact on the diplomatic personnel of the mission or on the mission itself. Those effects—which include the increased risk of injury to the physical security of the mission, the potential impairment of the independence of mission personnel and the dignity and peace of the mission, the potential for retaliatory action by the foreign government, and the implications for reciprocal protection—are all content-neutral and viewpoint-neutral.

Accordingly, the limited geographical restrictions in Section 22-1115 clearly are "not * * * affected by sympathy or hostility for the point of view being expressed by the communicator" (*Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 67-68 (1976) (plurality opinion)). Rather, here, as in *Renton*, the statute "does not contravene the fundamental principle that underlies our concern about 'content-based' speech regulations: that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views'" (slip op. at 6-7, quoting *Police Department* v. *Mosley*, 408 U.S. 92, 95-96 (1972)).[24]

b. Moreover, even content-based or viewpoint-based restrictions are permissible if they are narrowly tailored

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[23] For example, if two foreign governments were in dispute, Section 22-1115 would permit those favoring either side to demonstrate in the immediate vicinity of the embassy of the government they favor, but not of the government they disfavor.

[24] For the same reason, this also is not a case, such as that described in the passage in *City Council* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984), quoted by petitioners (Br. 11), in which the regulation reflects "a desire to * * * exclude the expression of certain points of view from the marketplace of ideas" (*id.* at 804). Nor does the Government "'pick and choose' between different views," as petitioners suggest (Br. 12, quoting *Perry Education Ass'n* v. *Perry Local Educators Ass'n*, 460 U.S. 37, 55 (1983)).

to serve governmental interests that are "substantial" (*Carey* v. *Brown*, 447 U.S. 455, 461 (1980)) or "compelling" (*Perry Education Ass'n* v. *Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983)). Here, those standards plainly are satisfied. As we have explained, the governmental interest in protecting the security, peace, and dignity of a foreign mission is compelling. Furthermore, Section 22-1115 is narrowly tailored to accomplish that end, and in fact it was so tailored precisely to ensure that it would not curtail other expressive conduct. The "special duty" under Article 22(2) of the Vienna Convention does not require the receiving State to protect the mission against such things as noise, traffic, and even picketing and parades that are associated with the normal use of the streets and sidewalks in the neighborhood and that do not have a direct nexus to the mission or interfere with its effective functioning. For this reason, Section 22-1115 preserves the right of the people to use the streets and sidewalks for the full range of activities that are unrelated to the foreign mission, since in that situation the presence of the mission is irrelevant and the streets and sidewalks are properly regarded as having the same character as those outside the 500-foot buffer zone. But where individuals seek to engage in conduct that is directed against the foreign government or its policies—where they wish to picket or demonstrate precisely *because* of, not in spite of, the presence of the mission—the streets and sidewalks do not have the same character as those in other parts of the City. Cf. *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279 (1979). In that situation, the individuals seek to take advantage of the presence of the mission. That purpose directly implicates the justification for the 500-foot buffer zone, and the protections of Section 22-1115 therefore are triggered.[25]

[25] Petitioners also contend (Br. 43-46) that the statutory scheme violates equal protection principles, under *Police Department* v. *Mosley*, 408 U.S. 92 (1972), and *Carey* v. *Brown*, 447 U.S. 455 (1979), because of a proviso contained in D.C. Code § 22-1116. The proviso states "that nothing in [Section 22-1115] shall be construed to prohibit picketing, as a result of a bona fide labor dispute regarding the alteration, repair, or construction of either buildings or premises occupied, for business purposes, wholly or in part, by representatives of foreign governments." We agree with the court of appeals (Pet. App. 48a n. 19) that this contention was properly rejected by the three-judge district court in *Jewish Defense League, Inc.* v. *Washington*, 347 F. Supp. 1300 (D.D.C. 1970). Picketing incident to a bona fide labor dispute would in all probability be directed not to the foreign government or its embassy and diplomatic personnel, but to the contractor who was performing the repair work. Moreover, such a labor dispute concerns domestic matters, and it therefore is quite different from the sort of controversies surrounding a foreign government's national and international policies to which Section 22-1115 is directed. Thus, Congress reasonably could conclude that the picketing and demonstrations prohibited by Section 22-1115 would be " 'clearly more disruptive' " (*Carey*, 447 U.S. at 460 (quoting *Mosley*, 408 U.S. at 100)) of the security, peace and dignity of the mission than a labor dispute.

In any event, the labor proviso was added without debate, almost as an afterthought, following the Senate's completion of its debate on the substance of Section 22-1115. 81 Cong. Rec. 8593 (1937). It therefore is clearly severable from Section 22-1115, which Congress believed to be of significant importance. Cf. *Carey*, 447 U.S. at 459 n.2. As the three-judge court in *Jewish Defense League* observed, there is "nothing to indicate that Congress would have preferred to void section 1115, and thus dispense with all domestic legislation carrying out this particular international obligation, if the labor picketing proviso could not be constitutionally sustained" (347 F. Supp. at 1302). See *Alaska Airlines, Inc.* v. *Brock*, No. 85-920 (Mar. 25, 1987), slip op. 5.

viously would result only from picketing or congregating in opposition to the foreign government's policies. Accordingly, to paraphrase *Cox*, the statute is "narrowly drawn to punish specific conduct that infringes a substantial [federal] interest in protecting the [diplomatic] process" (379 U.S. at 564). Finally, the statute is intended to guard against occasions that might induce foreign nations or their people to take hostile measures against this Nation or its citizens in retaliation for a pretended or real affront at its embassy in Washington. Once again, that purpose requires barring only conduct that opposes the policies of the foreign government. Indeed, in this respect, the statute is similar to one that makes it unlawful to utter "fighting words," since the rationale of the prohibition is to prevent violence (or its functional equivalent) that may result. It has never been thought that a "fighting words" statute must be "viewpoint neutral" in the sense that if it makes it unlawful to shout an expletive at another person, it also must make it unlawful to shout: "Well done!"

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1987

APPENDIX

District of Columbia Code (1981);

§ 22-1115. Interference with foreign diplomatic and consular offices, officers, and property—Prohibited.

It shall be unlawful to display any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party, or organization, or any officer or officers thereof, or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government, party, or organization, or to intimidate, coerce, harass, or bring into public disrepute any officer or officers or diplomatic or consular representatives of any foreign government, or to interfere with the free and safe pursuit of the duties of any diplomatic or consular representatives of any foreign government, within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, or for other official purposes, except by, and in accordance with, a permit issued by the Chief of Police of the said District; or to congregate within 500 feet of any such building or premises, and refuse to disperse after having been ordered so to do by the police authorities of the said District. (Feb. 15, 1938, 52 Stat. 30, ch. 29, § 1; 1973 Ed., § 22-1115.)

THE SECRETARY OF STATE
WASHINGTON
June 30, 1987

Dear Mr. Chairman:

I would like to thank you for inviting the Department of State to present its views concerning Bill 7-59, Protection for Foreign Officials, Official Guests, and Internationally Protected Persons Amendments Act of 1987. Louis Schwartz, Deputy Assistant Secretary and Director, Diplomatic Security Service, will appear before the Council to testify on behalf of the Department of State.

The protection of foreign embassies is a matter of vital importance to me and to the Department of State. The Vienna Convention on Diplomatic Relations obligates the parties to protect the premises of diplomatic missions and to prevent any disturbance of the peace of the mission or the impairment of its dignity. The United States Government takes these obligations seriously, and expects other governments to do the same. Our experience has been that D.C. Code section 25-1115 has been an effective means of fulfilling these obligations.

We must scrupulously honor our obligation to protect foreign diplomatic missions in order to ensure that United States missions abroad receive reciprocal treatment. I am therefore deeply concerned about Bill 7-59, which would eliminate the existing "500 foot rule," thereby permitting demonstrations in close proximity to embassies. Such a change, at the very time when we are urging other governments to increase security for our diplomats abroad, could place our diplomats at risk. We therefore oppose any proposal that would reduce the 500 foot protected area.

I hope that you and the other members of the Council will take into account these considerations and that you will not take any legislative action that could be perceived by other governments as a relaxation of our security standards.

Sincerely yours,

/s/ George P. Shultz
GEORGE P. SHULTZ

The Honorable David A. Clarke, Chairman,
City Council,
District of Columbia.

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL BOOS, *et al.*,
Petitioners,

v.

MARION S. BARRY, JR., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION AND VANNA OM STRINKO IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF AMICI CURIAE	1
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. THE SECOND CLAUSE OF D.C. CODE SEC. 22-1115 VIOLATES THE FIRST AMENDMENT GUARANTEES OF FREE SPEECH AND ASSEMBLY	6
A. D.C. Code § 22-1115 Is Not Narrowly Tailored To Serve The Governmental Interests	8
B. D.C. Code § 22-1115 Fails To Provide Ample Alternatives For The Exercise of Free Speech	15
II. THE SECOND CLAUSE OF D.C. CODE § 22-1115 VIOLATES THE FIRST AND FIFTH AMENDMENT BECAUSE IT IS OVERBROAD ON ITS FACE AND VOID FOR VAGUENESS	16
III. D.C. CODE § 22-1115 WHEN READ TOGETHER WITH §§ 22-1116 VIOLATES THE EQUAL PROTECTION CLAUSE	19
CONCLUSION	20

TABLE OF AUTHORITIES

CASES — Page

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 16, 17
Brown v. Louisiana, 383 U.S. 131 (1966) 7
Carey v. Brown, 447 U.S. 455 (1980) 19
CISPES v. FBI, 770 F.2d 468 (5th Cir. 1985) 13
Clark v. Community for Creative Nonviolence, 468 U.S. 288 (1984) 7
Finzer v. Barry, 798 F.2d 1450 (D.C. Cir. 1986) ..... *passim*
Frend v. United States, 100 F.2d 691 (D.C. Cir. 1938), *cert. denied*, 306 U.S. 640 (1939) 9
Grayned v. City of Rockford, 408 U.S. 104 (1972) 15
Hague v. CIO, 307 U.S. 496 (1939) 7
Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981) 7, 15
Jackalone v. Andrews, No. 79-259 (D.C. Cir. Nov. 19, 1979) 11
Jewish Defense League, Inc. v. Washington, 347 F. Supp. 1300 (D.D.C. 1972) 19
Kinoy v. District of Columbia, 499 F.2d 761 (D.C. Cir. 1968) 18
Kovacs v. Cooper, 336 U.S. 77 (1949) 16
Members of the City Council of Los Angeles v. Taxpawers for Vincent, 466 U.S. 789 (1984) 7
Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) 19
Regan v. Time, 468 U.S. 641 (1984) 7
Strinko v. United States, No. 85-1330 (D.C. Ct. App.) 3, 4
Thornhill v. Alabama, 310 U.S. 88 (1940) 16
United States v. Abrams et al., Cr. Nos. M-8158-8168-85 (D.C. Super. Ct. Oct. 27, 1985) 4
United States v. Grace, 461 U.S. 171, 176 (1983) 7
United States v. Lipkin, et al., Nos. 86-190-198 (D.C. Ct. App.) 3, 4
United States v. O'Brien, 391 U.S. 367 (1968) 7, 8, 11
United States v. Schnitzer, et al., Cr. Nos. M-9562-9583-85 (Sept. 17, 1985) 4
United States v. Strinko, Crim. No. M1218-85 (D.C. Super. Ct.) 2

TABLE OF AUTHORITIES—Continued

Page

White House Vigil for the ERA Committee v. Clark, 746 F.2d 1518 (D.C. Cir. 1984) 7
Zaimi v. United States, 476 F.2d 511 (D.C. Cir. 1973) 9, 17
Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976) 11

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I ..... *passim*
U.S. Const. Amend. V ..... *passim*

STATUTES

18 U.S.C. § 112(b) 12, 13, 14, 15, 17
D.C. Code § 22-1107 11
D.C. Code § 22-1115 ..... *passim*
D.C. Code § 22-1116 19

MISCELLANEOUS AUTHORITIES

81 Cong. Rec. 8587, *et seq.* (1937) 9, 10
The Prosecution of Demonstrators Outside The Soviet Embassy: Hearings before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. (May 15, 1986) 4
S. Rep. No. 92-1105 (1972) 14
U.S. Dept. of State, Digest of U.S. Practice in International Law (1979) 13
The Washington Post, Oct. 2, 1984 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-803

MICHAEL BOOS, *et al.*,
Petitioners,

v.

MARION S. BARRY, JR., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION AND VANNA OM STRINKO IN SUPPORT OF PETITIONERS

INTERESTS OF AMICI CURIAE

The Washington Legal Foundation ("WLF") is a non-profit public interest law center with nationwide membership, based in Washington, D.C. WLF engages in litigation and administrative cases concerning a variety of issues of concern to its membership and clients. WLF has appeared before this Court as *amicus curiae* on numerous occasions.

Our particular interest in this case arises out of our representation of *amicus* Vanna Om Strinko, a Cambodian refugee who was arrested and prosecuted for violating the second clause ("congregation clause") of D.C.

Code § 22-1115 for merely standing silently for a few minutes on a public sidewalk in front of the Soviet Embassy on January 28, 1985. She did not block any pedestrian traffic on the sidewalk or vehicular traffic in front of the Soviet Embassy. She did not interfere with the movement or duties of any embassy or non-embassy personnel, or threaten any injury to any person or property. She did not have nor did she display "any flag, banner, placard, or device" designed to intimidate, coerce, or bring into public odium any foreign government. She made no threatening gestures. She was not offensive. She shouted no epithets. She sang no songs. She never entered embassy property. She simply stood *silently* and peacefully outside the gate of the Soviet Embassy on a public sidewalk after an embassy employee, who came to the front gate, refused to accept from her an envelope containing a petition. *See United States v. Strinko*, Crim. No. M1218-85 (D.C. Super. Ct.).

Motions to dismiss the Information against her on the grounds that the second clause of the D.C. Code § 22-1115 was unconstitutional and that she was being selectively prosecuted[1] were denied by the Superior Court of the District of Columbia on July 30, 1985. The trial court did, however, limit the reach of the statute slightly by requiring that the "congregation" must have "direct relationship" to the embassy in question, but otherwise upheld the law's reach to peaceful gathering. *Id.*

[1] In her selective prosecution defense, Mrs. Strinko argued that several thousand protesters in front of the South African Embassy had been arrested for violating the congregation clause of § 1115, but not a single case was prosecuted, nor have there been any to date. The Court refused Mrs. Strinko any opportunity for discovery to determine the reason for this obvious and unfair discrepancy in the prosecution of the laws. While the Court of Appeals below made it clear that no selective prosecution issue was before it, *Finzer v. Barry*, 798 F.2d 1450, 1475 n.21 (D.C. Cir. 1986), this widespread practice by the law enforcement authorities to enforce this law in a selective fashion underscores the constitutional infirmities of the law.

Mrs. Strinko was eventually tried before the Court without a jury on September 19, 1985 and was convicted. She was given a ten-day suspended jail sentence, assessed costs, and placed on unsupervised probation. Two days before the *Strinko* case was to be argued before the D.C. Court of Appeals, this Court granted certiorari in the instant case. Consequently, the D.C. Court of Appeals stayed the *Strinko* case pending the disposition of this case. *Strinko v. United States*, No. 85-1330 (D.C. Ct. App.) (Order of Feb. 27, 1987).

Subsequent to Mrs. Strinko's arrest, several other individuals and groups were similarly arrested and successfully prosecuted for violating the second clause, or congregation clause of D.C. Code § 22-1115. In *United States v. Lipkin, et al.*, Nos. 86-190-198 (D.C. Ct. App.), for example, nine Jewish rabbis and human rights supporters were also arrested and prosecuted for engaging in peaceful conduct in front of the Soviet embassy similar to Mrs. Strinko. According to the stipulated facts in that case, the nine defendants

> gathered on the public sidewalk in front of the Soviet Embassy at 1 Sakarov Plaza, N.W., Washington, D.C. The date and time of this gathering was arranged in advance by representatives of the defendants and the Metropolitan Police Department. Defendants did not carry any signs or placards and did not shout or chant. They did not harass or interfere with people passing by or entering the Embassy. Each made a short statement of the reasons he or she was present. These reasons related to the Soviet policy or persecuting and violating the human rights of Soviet Hebrew teachers, Jewish activists, and Jews who had applied for permission to emigrate. The statements identified individual cases of ongoing maltreatment. After four minutes, defendants were ordered by police officers immediately to disperse. Each defendant heard and understood this order, but none responded. One minute after the

police warning, the defendants were arrested and taken into police custody. *Id.* (Brief of Appellants at 2.)

The *Lipkin* case was to have been argued before the D.C. Court of Appeals on the same day as the *Strinko* case, but it too was stayed pending the disposition of the case at bar. Other similar cases of congregating near the Soviet Embassy have been prosecuted with an unrelenting vengeance, some of which are in the appellate process, while other defendants decided to forego an appeal for lack of resources or other such reasons. *See, e.g., United States v. Abrams*, Crim. Nos. M-8158—8168-85 (D.C. Super. Ct. Oct. 27, 1985); *United States v. Schnitzer, et al.*, Crim. Nos. M-9562—9583-85 (D.C. Super. Ct. Sept. 17, 1985).

In addition to representing Mrs. Strinko, *amicus* Washington Legal Foundation has been solicited for legal advice on numerous occasions on the application of D.C. Code § 22-1115 by individuals wishing to stage a silent and peaceful protest near the Soviet Embassy. Consequently, *amicus* WLF has a continuing interest in the issues being litigated in this case. Further, WLF testified before a Senate hearing investigating the selective prosecution under D.C. Code § 22-1115 of anti-Soviet demonstrators. *The Prosecution of Demonstrators Outside The Soviet Embassy: Hearings before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. (May 15, 1986).

Because our client and others similarly situated were prosecuted under the congregation clause, we will focus our argument on that clause, although many of the same reasons supporting a ruling that the second clause is unconstitutional would also support a finding of unconstitutionality of the first clause ("flag and banner clause") as well.

STATEMENT OF THE CASE

In the interest of judicial economy, *amici* adopted by reference the statement of the case as set forth in the brief of petitioners.

SUMMARY OF THE ARGUMENT

D.C. Code § 22-1115, especially the second clause, which makes it a crime for three or more persons merely to congregate within 500 feet of an embassy and to refuse to disperse when ordered by the police at their whim to do so, is clearly an unconstitutional restriction of the First Amendment's guarantee of free speech and assembly. The primary defect of such a sweeping and overbroad law is that it is not narrowly tailored as required by controlling Supreme Court case law to further the governmental interest of protecting embassy personnel or property. It is unconstitutional on its face.

In addition, the law gives unfettered discretion to the police authorities to order peaceful groups to disperse from public sidewalks. The second clause further makes congregating unlawful where no one is carrying any signs or banners, nor singing or shouting any slogans, nor otherwise disturbing the peace. This Court has not hesitated to strike down laws which provide more guidance to the exercise of police discretion than that found in D.C. Code § 22-1115.

Nor does the limiting construction placed on the statute by some of the local trial judges in the Superior Court of the District of Columbia—*i.e.*, that the congregation must have a "direct relationship" to the embassy —save the law from being constitutionally infirm. Nor is the second clause saved by the vague limiting construction placed on it by Judge Bork who, speaking for the court below, stated that dispersals may be ordered only "in accord" with the statute's concerns for the "peace and security of the embassy." *Finzer v. Barry*, 798 F.2d

1450, 1472 at n.17 (D.C. Cir. 1986). Indeed, the Court below was without any authority to narrow the reach of the statute since that judicial function, if deemed appropriate, should have been reserved for the District of Columbia Court of Appeals. The lower court, therefore, was obliged to strike down the second clause having found it to be constitutionally infirm.

ARGUMENT

I. THE SECOND CLAUSE OF D.C. CODE § 22-1115 VIOLATES THE FIRST AMENDMENT GUARANTEES OF FREE SPEECH AND ASSEMBLY.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . . ." The second clause of § 22-1115 prohibits all congregations of three or more people within 500 feet of any building "used or occupied" by any foreign representative, regardless of the purpose of the congregation or how peaceful it may be, and to fail to disperse when ordered to do so. Such a broad restriction on the exercise of First Amendment freedoms is clearly unconstitutional.

Amici recognize that the government has a legitimate interest in preserving the safety and security of diplomatic personnel both here and abroad. No one disputes that. The question in this case is how far can the Government restrict the constitutional rights of its citizens in order to achieve that goal. The blunderbuss approach found in the second clause of D.C. Code § 22-1115 clearly is not narrowly tailored to serve that government interest. Nor does the lower court's attempt to narrow the reach of the second clause pass constitutional muster.

The statute on its face and as construed limits the right of citizens to congregate and assemble even on public sidewalks. Indeed, in the case of *amicus* Vanna Strinko and similar cases, the individuals were at all

times on the public sidewalk. Access to sidewalks "is a small but invaluable part of every American heritage . . . . Sidewalks, like streets and parks, are places whose title has immemorially been held in trust for the use of the public. As such, they occupy a privileged position in the hierarchy of First Amendment jurisprudence." *White House Vigil for the ERA Committee v. Clark*, 746 F.2d 1518, 1526 (D.C. Cir. 1984), *citing Hague v. CIO*, 307 U.S. 496 at 515 (1939); *United States v. Grace*, 461 U.S. 171 (1983). *See Brown v. Louisiana*, 383 U.S. 131 (1966).

The Supreme Court has consistently held that restrictions by the government on the exercise of First Amendment freedoms are unconstitutional unless they are reasonable with respect to time, place, and manner. Such restrictions must be (1) content-neutral, (2) narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels for the exercise of the First Amendment right in question. *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 291 (1984); *Regan v. Time*, 468 U.S. 641, 645 (1984); *United States v. Grace*, 461 U.S. 171, 176 (1983); *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 790 (1984); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647-48 (1981); *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

The test articulated in *O'Brien*, *supra*, is slightly different when the statute being scrutinized is content or viewpoint-neutral, as the second clause of § 22-1115 appears to be. In such situation, the Supreme Court in *Taxpayers for Vincent*, *supra*, reiterated the four-part test of *O'Brien*, 391 U.S. at 377:

> [A] government regulation is sufficiently justified if [1] it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the govern-

> mental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. 466 U.S. at 790.

While there is some debate as to whether there is any real difference between the standards articulated in time, manner, and place cases and that in *O'Brien*, there can be no doubt that the second clause of § 22-1115 violates both tests.

The second clause of § 22-1115 is a time, manner, and place restriction of the exercise of First Amendment freedoms. It prohibits the congregation of three or more people (manner) within 500 feet of a building used or occupied by foreign representatives (place), at all times of the day or night but only when ordered to disperse by the police (time). The modification of the statute by the court below, *i.e.*, that the congregation be a "threat to the security or peace of the embassy" appears to qualify the "manner" restriction. However, as will be demonstrated below all of these restrictions are either not reasonable ones or are vague, and are therefore unconstitutional.

A. D.C. Code 22-1115 Is Not Narrowly Tailored To Serve The Governmental Interests.

In applying the four-part test of *O'Brien*, there is no dispute that the second clause satisfies the first criteria —that it is within the constitutional power of the Government—as well as the second criteria—that it further an important government interest. But so would a law banning congregations within 1,000 feet or 2 miles of an embassy. The key question is whether the law satisfies the *O'Brien* criteria that it be narrowly tailored to serve the asserted governmental interest. The answer is obviously no.

The government interest in enacting D.C. Code § 22-1115 in 1937 as expressed in its legislative history is the protection and safety of embassy personnel. *See Zaimi v. United States*, 476 F.2d 511 (D.C. Cir. 1973); *Frend v. United States*, 100 F.2d 691 (D.C. Cir. 1938). A reading of the legislative history gives the clear impression that there was no intention to limit mere congregation if it was not accompanied by threatening conduct. As stated by then Senator Pittman, the sponsor of the legislation:

> What the joint resolution seeks to do is to protect these sanctuaries and the diplomats and their families within them. *It has no other purpose. I seek not to protect its occupants so much from insult as to provide for their safety.*

81 Cong. Rec. 8587 (1937) (emphasis added). This statement by the bill's sponsor seems to contradict the lower court's emphasis on the alleged governmental interest of protecting embassy personnel from mere insults. 798 F.2d at 1456-57.

Senator Pittman also cited a few police reports of demonstrations which involved banners, signs, and placards, or where demonstrators wanted to go on the steps of an embassy and make a speech. 81 Cong. Rec. at 8486. However, he was only concerned about those demonstrations "which are likely to incite mob violence." *Id.* at 8587. Clearly, neither the first nor the second clause as written is narrowly tailored or limited to this concern. It prohibits congregations *without* any flags or banners, those which are peaceful such as silent vigils which are unlikely to lead to any violence, and those on public sidewalks rather than on embassy steps or property.

Senator Pittman made it clear that he did not want to limit mere peaceful congregations. During the course of debate on the bill, Senator La Follette, who was critical of Senator Pittman's proposal, repeatedly characterized

the intent of the law as a broad restriction on mere assembly. Senator Pittman repeatedly denied such intentions. The following is a typical exchange between the two Senators:

> *SENATOR LA FOLLETTE*: . . . Senator [Pittman] proposes to create an area on the public streets and highways within 500 feet of any premises occupied by a representative of a foreign government accredited to this Government *where no person may go, no matter how well-behaved he may be, no matter how proper his conduct may be*, unless he had business to transact there.
>
> *SENATOR PITTMAN*: *I do not see where the Senator finds that in the amendment I have offered* . . .
>
> • • • •
>
> *SENATOR LA FOLLETTE*: . . . Senator [Pittman] proposes to create an area of 500 feet where no person may harass or annoy, or go there for any purposes excepting as he may have legitimate purpose of transacting business there.
>
> *SENATOR PITTMAN*: I do not find the provision in the joint resolution. That is in the Senator's imagination.

81 Cong. Rec. at 8591 (emphasis added).

Clearly, the sweeping statute as enacted is not narrowly drawn to serve the governmental interest of protecting the safety of diplomatic personnel. The sponsor of the bill disavowed any intention to prevent mere congregating. There is no justification, much less a compelling one, to prohibit the silent or peaceful congregation of persons on the public sidewalks and streets within 500 feet of foreign embassies. A related government interest of protecting our own personnel abroad from retaliation while legitimate, does not justify the broad restrictions

on mere congregating.[2] In *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976), the court rejected the fear of Soviet retaliation as a sufficient governmental interest to justify limiting the first amendment rights of American citizens.

Even if the statutory provision in question as construed by the court below is considered to be content-neutral, it nevertheless fails to meet the requirement that it be narrowly drawn to serve a significant government interest. For that reason alone, the statute is unconstitutional. The law does not satisfy the *O'Brien* test that the restriction be "no greater than is essential to the furtherance of [the government] interest." 391 U.S. at 377.

The District of Columbia police already have in their arsenal ample laws and regulations that are very broad but nevertheless more narrowly drawn than D.C. Code § 22-1115. Those laws can easily be invoked to prevent any disruptive activities of any congregation. *See, e.g.*, D.C. Code §§ 22-1107 (unlawful assembly). Thus, if the police reasonably believe a breach of the peace is immi-

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[2] Any concern for retaliation against our embassy or personnel in Moscow is simply not credible. The Soviets encourage its citizens to demonstrate in front of the U.S. Embassy in Moscow with banners and placards. *See The Washington Post*, Oct. 2, 1984, at A16. It is a pretty sad state of affairs that in a democracy, three citizens cannot simply stand peacefully on a public sidewalk near the Soviet Embassy without any banners, but that in a totalitarian society, thousands waving banners critical of the United States can noisily demonstrate in front of the U.S. Embassy in Moscow with a flourish. In addition, during the time that Iran held our diplomats hostage, vigils and demonstrations were held in front of the Iranian Embassy before it was ordered closed without any arrests or prosecution of the demonstrators. *See* Affidavit of Deputy Chief of Police John C. Connors at ¶ 8 (May 7, 1984) (J.A. at 28). One would think that in such a situation, the law would have been scrupulously enforced to prevent further retaliation. *Cf. Jackalone v. Andrews*, No. 79-259 (D.C. Cir. Nov. 19, 1979), *cited* in *Finzer*, 798 F.2d at 1466.

nent, they can instantaneously set up a police line, order the congregation to disperse, and arrest those who disobey.

The passage by Congress of 18 U.S.C. § 112(b) in 1972 to protect diplomatic personnel and property outside of the District of Columbia is proof positive that Congress is capable of enacting legislation which is narrowly tailored to serve the governmental interest at hand. In particular, 18 U.S.C. § 112(b)(3) provides:

> (b) Whoever willfully—
>
> (1) intimidates, coerces, threatens, or harasses a foreign official or an official guest or obstructs a foreign official in the performance of his duties;
>
> (2) attempts to intimidate, coerce, threatens, or harass a foreign official or an official guest or obstruct a foreign official in the performance of his duties; or
>
> (3) within the United States *but outside the District of Columbia* and within one hundred feet of any building or premises in whole or in part owned, used or occupied for official business or for diplomtic, consular, or residential purposes by—
>
> (A) a foreign government, including such use as a mission to an international organization;
>
> (B) an international organization;
>
> (C) a foreign official; or
>
> (D) an official guest;
>
> congregates with two or more other persons *with intent to violate any other provisions of this section*;
>
> shall be fined no more than $500 or imprisoned not more than six months, or both. (Emphasis added.)

The Fifth Circuit made it clear in *CISPES v. FBI*, 770 F.2d 468 (5th Cir. 1985) that this law does not ban "peaceful demonstrations, even within the 100 foot perimeter," and that such peaceable assemblies "of course, cannot be made a crime." 770 F.2d at 477. Only those assemblies that have the specific *intent* to engage in disorderly conduct such as harassing or threatening diplomatic *personnel* are prohibited by 18 U.S.C. § 112. Section 1115, on the other hand, is clearly overbroad and punishes congregations whose only "intent" is to congregate near certain buildings.

And while the Soviet Union opposes any kind of dissent or protest, however peaceful, our government has in the past found 18 U.S.C. § 112 sufficient to meet our obligations to protect diplomatic personnel and property while at the same time protecting the First Amendment rights of our citizens. Thus, in 1979, the Soviet Embassy not surprisingly complained about two peaceful demonstrations that had taken place near the U.S.S.R. Consulate General Office in San Francisco. The State Department replied in a note to the Soviet Embassy dated February 23, 1979 stating:

> The Department of State confirms that the events referred to in the Embassy's note were of a peaceful nature. Under U.S. law the demonstration was not illegal, *since it was of a peaceful nature and there was no intent to violate any provision of* . . . [18 U.S.C. 112].
>
> The Department of State reiterates its earlier and continuing assurances to the Embassy of the U.S.S.R. that as the host country the United States will continue to take the necessary measures to safeguard Soviet properties and personnel in San Francisco.

Dept. of State File No. P79 0025-1898 *quoted in* U.S. Dept. of State, *Digest of U.S. Practice in International Law* 674 (1979) (emphasis added).

The lower court glossed over the significance of Congress' enactment of 18 U.S.C. § 112(b) in a footnote by speculating why Congress "might choose to differentiate between the two [statutes]." 798 F.2d at 1463, n.9. The court of appeals first speculated that Congress may have been concerned with the "greater concentration of embassies in the District of Columbia and the special visability of the capital, [making] enhanced protection necessary." *Id.* Not only is there no legislative history supporting this speculation, the proffered reason does not make any sense. A demonstration against a particular embassy in the District of Columbia, or a consulate in New York City, is site-specific. The fact that there may be several hundred embassies elsewhere in Washington, D.C. and a lesser number of consulates elsewhere in New York City, is irrelevant to the alleged governmental interests sought to be protected by the legislation for the specific embassy in question.

The second speculation by the lower court was that "Congress relies to some extent on state and local governments to provide whatever additional measures are necessary to protect foreign nationals, aware *perhaps* that security needs may differ from state to state" and further noting that the Secret Service has less authority outside the District. *Id.* (emphasis added). Again, logic would dictate that if Congress wanted to ensure that the law of nations was being scrupulously adhered to, it would provide for stricter controls *outside* the District where Secret Service presence is felt less, rather than rely on the vagaries of local police jurisdictions to enforce international law.

As it turns out, no speculation is needed to divine congressional intent in enacting § 112(b). Congress did not extend the 1972 Act to the District of Columbia simply because it was advised that "a District law of long standing affords similar protection to foreign officials in the Nation's Capital." S. Rep. No. 92-1105, *reprinted in*

[1972] U.S. Code Cong. & Ad. News 4316, 4328. It is clear, though, that a comparison between the two laws shows that the District law is *not* similar in its effect, but far surpasses the narrowly drawn and constitutionally sensitive nationwide legislation.

For the foregoing reasons, the second clause of D.C. Code § 22-1115 and the construction imposed by the court below clearly violates the First Amendment, and fails to satisfy the reasonable time, place, and manner restrictions required by Supreme Court case law. If this Court believes that, instead of striking down the law *in toto*, it has the authority to interpret the law in such a way as to save its constitutionality, *cf. Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972), there certainly would be no disrespect shown to the Congress if D.C. Code § 22-1115 was interpreted as being co-extensive with 18 U.S.C. § 112(b).

B. D.C. Code § 22-1115 Fails To Provide Ample Alternatives For The Exercise of Free Speech.

The lower court's reliance on *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981) on the proposition that the First Amendment does not require that demonstrators have the "optimal setting for speech," is also misplaced. 798 F.2d at 1462. In that case, the statute did *not* ban mere congregations or assemblies. The religious group in *Heffron* was free to roam the fairgrounds to make speeches or proselytize. The only restriction was that literature and solicitations be carried out from pre-assigned booths in order to avoid crowd congestion. In the instant case, the statute bars *all* congregation within 500 feet of the embassy regardless of whether the gathering passes out any literature to passers-by. As the *Heffron* court emphasized, the "First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so *there must be opportunity to win their attention.*'" 452 U.S. 640, 655

citing Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (emphasis added). By placing a 500 foot enclave around an embassy, § 1115 effectively prevents any opportunity for citizens of modest means to peacefully "get" let alone "win" the attention of the object of their grievance. There is no ample alternative, for example, for hand-delivering a petition to the embassy to ensure its delivery.[3]

II. THE SECOND CLAUSE OF D.C. CODE § 22-1115 VIOLATES THE FIRST AND FIFTH AMENDMENT BECAUSE IT IS OVERBROAD ON ITS FACE AND VOID FOR VAGUENESS.

A law is unconstitutional on its face if it "does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech [or assembly] . . . ." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). *See* cases cited in *Broadrick v. Oklahoma*, 413 U.S. 601, 612-613 (1973). Where litigants can show that a law's overbreadth is real and substantial, "judged in relation to the statute's plainly legitimate sweep," *Broadrick*, 413 U.S. at 615, they can challenge a statute's prohibitions not only as applied to them, but also as it might be applied to "others not before the court . . ." (*id.* at 612). Judged by these standards, the second clause of § 22-1115 is unconstitutionally overbroad. The statute not only sweeps within its scope the peaceful and protected conduct of defendant, it prohibits any form of congregation

[3] It should be noted that foreign embassy officials not only conduct diplomacy with the United States government, but also conduct business directly with U.S. citizens, whether it be issuing travel or visitor visas, or encouraging U.S. businesses to expand their commercial and trading activities with that country. The law would permit three individuals to apply (petition) in person for travel visas to the Soviet Union, but bar those same individuals from petitioning the Soviet Government to issue exit visas for their relatives or prisoners of conscience in the USSR.

or assembly of three or more persons without regard to their purpose for congregating or without regard to any other conduct.

The sweep of this prohibition is "real and substantial." This is not a case where one can conceive of a rare or hypothetical situation where an otherwise valid law may prohibit legitimate and protected activity. Instead, the opposite is true. One is forced to strain to conceive of a formulation of a congregation that is *not* within the sweep of the law. The law prohibits all congregation within 500 feet of an embassy. Thousands of people are violating this law daily by congregating within 500 feet of an embassy whether on the streets, sidewalks, in their offices, or even in their own homes. The law does not aim at the evil within the allowable area of state control and thus is fatally overbroad.

On the other hand, the law's "plainly legitimate sweep," *Broadrick*, *supra*, 413 U.S. at 615, if any, is underinclusive. The law does not prohibit offensive oral utterances, including hostile shouting at the Ambassador's doorstep. *Zaimi*, *supra*. Two people can shout epithets all day long in front of the Soviet Embassy, but three persons cannot peacefully congregate in a silent vigil 499 feet away. The only possibly legitimate sweep of the law is to prohibit conduct designed to "intimidate, coerce, harass, or . . . interfere" with foreign officials—a purpose now adequately served in the District by another statute, 18 U.S.C. §§ 112(b)(1)-(2).

Even if the clause as limited by the court below were not considered overbroad, it is nevertheless void for vagueness. While no one will argue that once a congregation is ordered by the police to disperse[4] and they refuse to do so, there is no doubt about the law's reach; nevertheless, there are serious questions about the mean-

[4] Congregations, *per se*, are not unlawful; a substantive element of the offense is the order to disperse and a refusal to obey.

ing of the words "congregate" and "disperse." For example, it takes three or more persons to constitute a "congregation." *Kinoy v. District of Columbia*, 499 F.2d 761 (D.C. Cir. 1968). If two persons stand on the sidewalk in front of the embassy and two more colleagues are directly across the street, are the four congregating? Could the four of them walk two abreast up and down the sidewalk in front of the embassy? Is walking by the embassy "congregating"? Does an order to disperse require the "congregation" to move outside the 500 foot radius; or can two members of the congregation "disperse" one way for 20 feet and the other two so "disperse" another way, and then all four re-assemble or "re-congregate" a few moments later only to be subjected again to another dispersal order, *ad infinitum?*

Neither the "direct relationship with the embassy" limitation provided by the local D.C. trial courts nor the "threat to peace and security" gloss provided by Judge Bork does much to guide the police discretion. Three students taking pictures of the Soviet Embassy from the public sidewalk as part of a class project on Washington embassies are "congregating" in a way that has a "direct relationship" with the embassy. Three other students could be doing the same thing as a symbolic protest of the espionage activities of Soviet Embassy personnel. Yet the latter "congregation" may likely be the one to feel the brunt of the police discretion as being a congregation that insults the Soviet government or threatens the peace or dignity of the embassy.

Both the "flag and banner" and "congregating" clauses of D.C. Code § 22-1115 are, accordingly, overbroad and vague, and thus are likely to be invoked at the whim of the police officers.

III. D.C. CODE §§ 22-1115 WHEN READ TOGETHER WITH § 22-1116 VIOLATES THE EQUAL PROTECTION CLAUSE.

Amici also submit that the congregation clause violates equal protection principles since D.C. Code § 22-1116 permits congregations within 500 feet of an embassy in the form of picketing "as a result" of labor disputes regarding the Embassy or its premises. This distinction cannot stand under *Carey v. Brown*, 447 U.S. 455 (1980) and *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

Carey involved an Illinois statute which prohibited the picketing of residences and dwellings, but which contained an exception for, *inter alia*, "the peaceful picketing of a place of employment involved in a labor dispute." The Supreme Court found this statute to be "constitutionally indistinguishable from the ordinance invalidated in *Mosley*" (447 U.S. at 460), and held that it too violated equal protection.

Mosley and *Carey* require a finding of unconstitutionality here. As in *Mosley* and *Carey*, the statutes in this case discriminate on the basis of purpose and content between labor picketing and peaceful non-labor congregating, and are unconstitutional for that reason alone. The statute prohibits three or more persons from peacefully standing together 499 feet from the Soviet Embassy in a silent protest without any signs but would allow labor picketers "as a result" of a labor dispute to march in front of the Embassy with signs protesting the Soviet Union.

In a footnote, Judge Bork summarily rejected this significant equal protection argument by relying on *Jewish Defense League v. Washington*, 347 F. Supp. 1300 (D.D.C. 1972). 798 F.2d at 1474, n.19. In the first place, *Jewish Defense League* was merely a denial of a preliminary injunction and was therefore not an ad-

judication on the merits. Secondly, the district court focused only on the flag and banner clause of § 1115 rather than the second clause and noted that labor picketing is more of a domestic dispute "which the public takes as a fact of every day commercial life." 347 F. Supp. at 1302. However, no one can deny that in this city of protests, especially those occurring now at the South African Embassy, the public has taken such protests as a fact of everyday life. Indeed, the rare occurrence is not the political picket, but the sight of a labor picket in front of an embassy. Yet, the law allows such labor pickets to carry signs reading "Soviets Pay Gulag Wages" or "Soviets Use Slave Labor," but three signless and silent political protestors can be hauled away and prosecuted.[5] Accordingly, the second clause violates the equal protection clause.

CONCLUSION

For the foregoing reasons, the lower court decision must be reversed.

Respectfully submitted,

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[5] Attached as Appendix A is a reproduction of a flyer that was recently distributed to passers-by by labor union supporters standing on the sidewalk in front of the Canadian Embassy. It is *amici's* understanding that no arrests were made in this matter.

APPENDIX A

CANADIAN GOVERNMENT PERMITTING DESTRUCTION OF WORKERS WAGE STANDARDS YOUR JOB MAY BE NEXT

DEAR FRIEND

The Canadian Government is building an embassy at Pennsylvania Avenue and Sixth Street, N.W. The sheet metal workers employed by Loudoun Sheet Metal, Inc. at that project are receiving substandard wages and fringe benefits. We believe that any effort to destroy the wage standards of workers can spread over the community and threaten the security of all workers.

The Canadian government is permitting this construction to be performed by Loudoun Sheet Metal, Inc. and thereby undercutting the normal wage rate for this work. We don't believe the Canadians should profit by depriving American workers of a fair wage. Please call or write the Canadian Ambassador Allan Gotlieb at 1746 Massachusetts Avenue, N.W., Washington, D.C. 20036, 785-1400, to express your support for maintaining the wage standards of our community.

PLEASE HELP A FELLOW WORKER

CALL 785-1400 THANK YOU

Although the Soviet Union has been criticized for their stand on civil rights, they had the decency to honor area standards and wages when they built their facilities in Washington, D.C.

The Canadian government, as our friend, should do no less.

HELP
SHEET METAL WORKERS' LOCAL UNION NO. 100
WASHINGTON AREA

AMICUS CURIAE

BRIEF

No. 86-803

FILED
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IN THE

Supreme Court of the United States

October Term, 1986

MICHAEL BOOS, J. MICHAEL WALLER and BRIDGET BROOKER,

Petitioners,

v.

MARION S. BARRY, JR., MAURICE T. TURNER, THE DISTRICT OF COLUMBIA AND FATHER R. DAVID FINZER,

Respondents.

BRIEF AMICUS CURIAE OF THE AMERICAN JEWISH CONGRESS

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TABLE OF CONTENTS

INTEREST OF THE AMICUS i

TABLE OF AUTHORITIES iii

SUMMARY OF ARGUMENT 1

ARGUMENT 9

I. D.C. Code §22-1115 Is Unconstitutional Under Well-Settled Constitutional Principles 9

A. The Ordinance Regulated Protected First Amendment Speech 10

B. The Placard Ban Impermissably Discriminates on the Basis of Viewpoint . . . 16

C. None of the Court of Appeals' Justifications for Viewpoint Discrimination Withstand Scrutiny 22

D. The Congregating Prohibition is Likewise Invalid Under Well-Settled Principles 27

E. Both Sections of the Ordinance Suffer from Vagueness 33

F. The Labor Exemption Cannot be Squared with Either the Interest in Security or Dignity of The Embassy 35

II. International Law Provides No Justification for §22-1115 . 37

A. International Law Does Not Require A Selective Ban on Demonstrations Outside Embassies . . . 40

B. Deference to the Legislative Judgment Has No Place in this Case . 52

C. The Foreign Affairs Power is Not an Exception to the First Amendment 56

CONCLUSION 61

Interest of the Amicus

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil and political liberties of American Jews. It also comes to the defense of endangered Jewish communities around the world, frequently by engaging in peaceful protests designed to call public attention to the mistreatment of Jews at the hands of foreign governments.

Just last year, six American Jewish Congress leaders were arrested and convicted, under the statute whose constitutionality is at issue here, for peacefully gathering in front of the Soviet Embassy to draw public notice again to the unremitting oppression of Soviet Jews. Had they gathered before the Soviet Embassy to praise the Soviet Union's prog-

ress in medicine or agriculture, they would have been protected, not arrested, by the police. It is because this distinction between favored and disfavored points of view violates the most fundamental principles of the Constitution's free-speech guarantee that AJCongress files this brief.

Table of Authorities

CASES

Baker v. Carr, 369 U.S. 186 (1962) 54

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) . . 53

Bolger v. Young's Drug Products Corp., 563 U.S. 60 (1983) . . 25

Brown v. Louisiana, 383 U.S. 131 (1966) 25,30

Cameron v. Johnson, 390 U.S. 611 (1968) 13

Cantwell v. Connecticut, 310 U.S. 296 (1940) . . . 23,28,30

Carey v. Brown, 447 U.S. 455 (1980) 12,35

CISPES v. F.B.I., 770 F.2d 468 (5th Cir. 1985) 45

City of Renton v. Playtime Theatres 106 S. Ct. 925 (1986) . . 13,16,26

Clark v. Community for Creative Non-Violence, 468 U.S. 288 14

Concerned Jewish Youth v. McGuire 621 F.2d. 471 (2d. Cir. 1980) 39

Consolidated Edison Co. v. P.S.C., 447 U.S. 530 (1980) . . . 17,24,31

Cornelius v. NAACP Legal Defense & Education Fund, 105 S.Ct. 3439 (1985) . . . 18

Cox v. Louisiana, 379 U.S. 536 (1965) 13,30,32

Curtiss-Wright Export Corp., 299 U.S. 304 (1936) 57

Davis v. Massachusetts, 167 U.S. 43 (1891) 12,48,49

Edwards v. South Carolina 372 U.S. 229 (1963) . . .10,30,32

F.C.C. v. League of Women Voters, 468 U.S. 364 (1984) . . 16

Feiner v. New York, 340 U.S. 315 (1951) 32

Fiallo v. Bell, 430 U.S. 787 (1977) 54

Finzer v. Barry, 798 F.2d 1450(D.C. Cir. 1986) . . . passim

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 19

Fowler v. Rhode Island, 345 U.S. 67 (1953) . . . 12,23,49

Freund v. U.S., 100 F.2d 691 (D.C. Cir. 1938) . . 10,11,12

Galvan v. Press, 347 U.S. 522 (1954) 54

Grayned v. City of Rockford, 408 U.S. 104 (1972) 13,14,15,26

Goldwater v. Carter, 444 U.S. 996 (1979) 53

Gregory v. Chicago, 394 U.S. 111 (1969) 29

Haig v. Agee, 453 U.S. 280 (1981) 55

Hudgens v. NLRB, 424 U.S. 507 (1976) 12

Jewish Defense League v. Washington, 347 F.Supp. 1300 (D.D.C. 1972) . . 36,37

Joseph Burstyn Inc. v. Wilson,
343 U.S. 495 (1952) . . 16

Kent v. Dulles, 357 U.S. 116 (1958) 56

Kleindeinst v. Mandel,
408 U.S. 753 (1977) 54

N.L.R.R. v. Fruit and Veg.
Pack. and Warehousemen,
377 U.S. 58 (1964) 14

Niemotko v. Maryland,
340 U.S. 268 (1951) 23

Northern Pipe Line Const. Co.
v. Marathon Pipe Line Co.,
458 U.S. 50 (1982) . . 61

Philadelphia Newspapers, Inc. v.
Hepps, 106 S. Ct. 1558 (1986) 11

Perez v. Brownell, 356
U.S. 44, 58 (1958) 58

Police Department of Chicago v.
Mosley, 408 U.S. 92 (1972) 17,35

Regan v. Wald, 468 U.S. 222 (1984) 53

Reid v. Convert, 354 U.S. 1, (1957) 57

Res. v. DeLongchamps,
1 Dallas 110 (1784) 49

Roth v. U.S., 354 U.S. 47 (1957) . . 16

Schacht v. U.S., 398 U.S. 58 (1970) 17

Schneider v. State, 308 U.S. 147 (1939) . . . 23,24,28

Shuttleworth v. City of Birmingham, 394 U.S. 149 (1969) 28,33

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) . . 29

Terminiello v. Chicago, 337 U.S. 1 (1949) 33

Thornhill v. Alabama, 310 U.S. 88 (1940) . . . 12,30,32

U.S. Civil Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973) 19

U.S. v. Grace, 461 U.S. 171 (1983) 12,13,14

U.S. v. O'Brien, 391 U.S. 367 (1968) 59

Young v. American Mini-Theatres 427 U.S. 50 (1976) 16,17,25

Zaimi v. U.S., 476 F. 2d 511 (D.C. Cir. 1976) 10

Zemel v. Rusk 381 U.S.1 (1965) . . 56

CONSTITUTIONAL AND STATUTORY MATERIALS

U.S. Constitution,
Art. 1, §8, cl.8 11,39

18 U.S.C. §112 42,43,44,47

81 Cong. Rec. 8586-94,
(Aug. 10, 1937) 40

District of Columbia Self-Government and Governmental Reorganization Act, P.L. 93-198, 87 Stat. 774 (1973) 48

Vienna Convention on Diplomatic Relations 23 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95 21,22,38,49

H.Rep. 94-1614, 94th Cong., 1st Sess., reprinted in 1976 U.S. Code, Cong. and Admin. News 4480 (1976) 45

Senate Conference Report, 92-1105, 92d cong. 1st Sess. (1972) reprinted in 1972 U.S. Code, Cong. Admin. News 4316 42

D.C. Code §22-1115 . . . . . passim

OTHER AUTHORITIES

1 Op. Atty. Gen. 52 (1974) 49

1 Op. Atty. Gen. 72 (1794) 49

7 M.M. Whiteman, Digest of Int. Law, (1970) . . . 22,46

American Heritage Dictionary 2d College Edition (1982) 35

Bollinger, L.C., The Tolerant Society (1986) . . . 16,57

IV G.H. Hackworth, Digest of International Law, (1942) 47

Harvard Codification of International Law, 26 Am. J. Int. Law 1 (1932) . . . 40,48

L. Henkin, Foreign Affairs and the Constitution, (1972) . . 57

L. Henkin, R.C. Puch, O. Schachter, & H. Smith, International Law (1980) . . 41

Przotacznik, Special Protection of Diplomatic Agents, 26 Revue de Droit International, 270 (October-December 1972) . . 50

Stone, Restrictions on Speech, 46 U. Chi. L. Rev. 81 (1978). . 19

SUMMARY OF ARGUMENT

1. D.C. Code §22-1115 regulates pristine political speech in a public forum where the authority of government to regulate speech is at its lowest ebb. Although government retains the right to impose reasonable neutral time, place, or manner restrictions on speech, neither the placard nor congregating prohibitions of §22-1115 qualify as time, place, or manner restrictions.

2. The prohibition on placards which call an embassy into "public odium" is neither content nor viewpoint neutral--that is, it restricts speech both on the basis of topic (here nonlabor-related speech, related to the embassy) and viewpoint (here, speech hostile to the embassy).

3. Contrary to the holding of the Court of Appeals, viewpoint restrictions are inevitably unconstitutional without regard to possible justifications. In Schact v. U.S., 398 U.S. 58 (1970), this Court struck a statute (strikingly similar to this one) which prohibited the wearing of a military uniform in theatrical production if it "discredited" the armed forces, and in Cornelius v. NAACP Legal Defense and Education Fund, 105 S.Ct. 3449 (1985), despite upholding the constitutionality of a subject matter restriction, this Court remanded the case for consideration of whether that restriction masked viewpoint discrimination.

4. Speech sometimes requires a particular locale to be meaningful, as decisions of the Court have recognized. In the context of a densely populated city like

Washington, D.C., spatial viewpoint discrimination distorts the marketplace of ideas because there is no likelihood that people will demonstrate so far from the object of their picketing as to break the connection between the speech and its target.

5. The second portion of the ordinance, affording police unfettered discretion to decide who may exercise First Amendment rights, runs afoul of some thirty years of decisions in which this Court has invalidated ordinances with such "ambulatory sweep." The Court of Appeals' suggestion that the police may order persons to disperse only if necessary to protect the security or dignity of an embassy fails to save §22-1115 because neither of these requirements meets the test of "a precisely drawn means of satisfying a compelling interest."

The government's affidavits are

directed at justifying a 500-foot demonstration-free zone, not an ordinance which picks and chooses between allowable demonstrations within that zone. Neither do the affidavits explain why such demonstrations outside the District of Columbia--allowable under federal law--do not implicate the government's asserted interest in the security and dignity of embassies.

6. The vagueness of the terms with which §22-1115 bans placards or assemblies which bring the embassy into public odium is yet another ground for invalidating it. These phrases essentially leave to the unfettered discretion of police officials whether or not to ban speech.

7. As was the case with the ordinances invalidated in Carey v. Brown, 447 U.S. 455 (1980) and Police Department v. Mosley 408 U.S. 92 (1972), §22-1115 exempts

labor picketing. But since such picketing can impair the dignity and security of the embassy as much as other hostile picketing, the existence of the exception undermines the justifications for this ordinance.

8. No other result is called for by international law. The Vienna Convention on Diplomatic Relations §33(2) requires the United States to protect the security and dignity of embassies. Thus the United States is obligated to provide sufficient police forces to accomplish these ends. The Convention also provides ample justification for viewpoint-neutral time, place or manner restrictions, such as noise limits, or limits on the size or timing of demonstrations. International law, however, provides no defense to the constitutional violations inherent in the ordinance.

9. The theoretical underpinning of

§33(2) is the need to protect the functioning of embassies, not the older representational or extraterritorial theories prevailing when the ordinance was enacted. Peaceful demonstrations do not interfere with an embassy's functioning, and do not breach the United States obligations under §33(2).

10. Congress has twice acted to enhance protection for embassies, while at the same time expanding the right to demonstrate. These Congressional determinations, although not in terms applicable to the District of Columbia, belie any suggestion that international law requires a flat ban on hostile embassy picketing.

11. The State Department itself has repeatedly rejected foreign protests against constitutionally protected activity. International law authorities also recognize that the protection of an em-

bassy's dignity must yield to the protection of free speech.

If as the Court below held, it was required to defer to the legislative and executive branches, it is this current practice, not a 50-year old one, that ought to be controlling, particularly where the more rigid view of international law impinges so drastically on First Amendment freedoms.

12. The Court of Appeals incorrectly adopted a posture of deference to a legislative foreign policy judgment, citing cases which dealt not with assertions of individual rights in the United States, but the allocation of power between the various branches or with the unique power of Congress over immigration. That court ignored this Court's warning that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." Cases

involving claims of individual rights, even those touching tangentially upon foreign affairs, are not appropriate for, and have not been treated with, deference.

13. This follows from the most fundamental of constitutional principles: that even in foreign affairs the United States "can act only in accordance with all the limitations of the Constitution" Reid v. Covert, 354 U.S.1, 5-6 (1957). And even where balancing permits some limitations on activities seemingly protected by the constitutional text, it is only those interests extraneous to the right at issue which may be balanced, not those inherent in the right itself. Cf. U.S. v. O'Brien, 391, 391 U.S. 367 (1968). If it were not so, courts would be perpetually re-striking the Constitutional balance on an ad hoc basis.

A R G U M E N T

I. D.C. CODE §22-1115 IS UNCONSTITUTIONAL UNDER WELL SETTLED CONSTITUTIONAL PRINCIPLES

Applied to a domestic[1] government building, each of the operative sections of §22-1115 would be unconstitutional. The first of these bans picketing while displaying any

> banner, placard, or device, designed or adapted...to bring into public odium any foreign government...within five hundred feet of any building...used...by any foreign government...as an embassy....[2]

---

[1] Point II demonstrates that international law requires no different result.

[2] As written, the statute allows even picketing which would bring the embassy into public odium if a permit is obtained. However, Freund v. U.S., 100 F.2d 691 (D.C. Cir. 1938), held that the ordinance authorized a permit only if the picketing would not bring the embassy in-

The second provision confers wholly unfettered discretion on the police to ban gatherings within five hundred feet of an embassy.[3]

A. The Ordinance Regulates Protected First Amendment Speech.

Picketing and group protests are an "exercise of...basic constitutional rights in their most pristine and classic form." Edwards v. South Carolina, 372 U.S. 229, 235 (1963). Because §22-1115 regulates picketing and rallies, that is, "pristine" speech, the burden is on the

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to public odium. Although this reading is, as Judge Wald put it, 798 F.2d at 1497, n. 25, "nonsensical", plaintiffs, mindful of the law of the circuit, did not challenge it.

3 These sections are independent of one another, Zaimi v. U.S., 476 F.2d 511 (D.C. Cir. 1976), although in this case the court below construed the second clause as authorizing the police to disperse groups only if necessary to advance the purposes of the ordinance--that is, protecting the security of the embassy and protecting it against impairments of its dignity.

District of Columbia to sustain its validity, not on plaintiffs to prove its invalidity. Philadelphia Newspapers, Inc. v. Hepps, 106 S.Ct. 1558, 1564 (1986).

The Court of Appeals nevertheless held that this ordinance burdening speech was constitutional. In essence, it held that Congress' power to define offenses against the law of nations, Art. I, §8, permitted it to enact §22-1115, no matter how much it encroached upon First Amendment rights. The extent of deference due to Congress' balancing of foreign policy and Free Speech interests can be determined only after assessing the extent to which the challenged ordinance invades First Amendment rights, a question to which we now turn.

This Court has repeatedly held that:

> Streets, sidewalks,[4] parks

[4] Accord Carey v. Brown, 447 U.S.

> and other similar public places, are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.
>
> Carey v. Brown, supra, 447 U.S. at 460, quoting Hudgens v. NLRB, 424 U.S. 507, 515 (1976).[5]

Accord U.S. v. Grace, 461 U.S. 177 (1983).

First Amendment rights to picket or patrol are not unlimited. Government may impose content and viewpoint neutral "time, place or manner" restrictions. To be constitutional such restrictions must be incapable of "discriminatory application," Cox v. Louisiana, 379 U.S. 536

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455 (1980); Thornhill v. Alabama, 310 U.S. 88 (1940).

[5] The statute was enacted and upheld by the Court of Appeals, U.S. v. Freund, supra, on authority of the now discredited decision in Davis v. Massachussetts, 167 U.S. 43 (1891). Understandably, the court below placed little reliance on Freund. Cf. Fowler v. Rhode Island, 345 U.S. 67(1953). See p.48, infra.

(1965), and must leave open ample alternative means of communication, City of Renton v. Playtime Theatres, 106 S.Ct. 925 (1986). Such rules "promote the public convenience in the interest of all," Cox v. Louisiana, supra, 379 U.S. at 554 --for example, to keep the streets open for other passersby or to allow unrestricted access to adjoining buildings. See Cameron v. Johnson, 390 U.S. 611 (1968).

Even so, such restrictions will be struck down if they unnecessarily "declare[] a [public forum] off-limits for expressive activity by members of the public," Grayned v. City of Rockford, 408 U.S. 104, 118 (1972); U.S. v. Grace, supra.[6] The existence of a public forum

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[6] In Grayned, this Court, while upholding an anti-noise ordinance applied to ban loud demonstrations outside a public school, indicated that a flat ban on even orderly demonstrations outside public schools could not be sustained be-

creates what amounts to a presumption that the space is available for free speech activity. That right of access cannot be denied unless the picketing is inconsistent with the ordinary use of the particular forum, e.g., picketing in a public bird sanctuary.

The sidewalk outside an embassy, like the sidewalk outside a public school, is a public forum. Orderly picketing against an embassy is no more inconsistent with the use of that forum than quiet and orderly picketing outside a public school, Grayned v. City of Rockford, supra, outside this Court, U.S. v. Grace, supra, in a public park, Clark v. Community for Creative Non-Violence,

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cause such activity would not be inconsistent with the uses to which the public sidewalk forum was ordinarily put. Cf. Cox v. Louisiana, supra, 379 U.S. at 555, n.13. And see N.L.R.B. v. Fruit and Vegetable Packers and Warehousemen, 377 U.S. 58, 78 (1964) (Black, J., concurring).

468 U.S. 288 (1984), or, indeed, the picketing outside an embassy which this ordinance permits--that is, picketing which does not bring the embassy into "public odium."

Of course, anytime picketing takes place, there is a potential security problem. Violence is not unknown when speech takes the form of picketing. Embassies may require a higher level of security than say, public schools, but, as shown by the fact that such picketing is legal everywhere but the District of Columbia, the problem is one of degree, not kind. Surely, additional police would adequately substitute for the discriminatory prohibitions of § 22-1115.

Finally, while the protections of the First Amendment extend far beyond political speech,[7] the political

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[7] Young v. American Mini-Theatres, 427 U.S. 50, 64 (1976); Roth v. U.S., 354

speech petitioners seek to engage in lies at the heart of the First Amendment.[8]

B. The Placard Ban Impermissibly Discriminates on the Basis of Viewpoint

Were the ban on display of placards a content neutral, time, place or manner restriction, it would be necessary to consider whether it was a reasonable response to legitimate government interests and whether it left open ample alternative means of communication.

None of these inquiries need be pursued. D.C. Code §22-1115 is not content neutral (that is, it does not allow speech on all subjects). Hence it presumptively violates the First Amendment, City of Renton v. Playtime Theatres, supra, 106 S.Ct. at 928. Moreover, this

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U.S. 47 (1957); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

8 F.C.C. v. League of Women Voters, 468 U.S. 364 (1984). See generally L.C. Bollinger, The Tolerant Society (1986).

ordinance is also not viewpoint neutral (that is, it allows some viewpoints to be heard, but not disfavored ones). It is therefore simply beyond constitutional repair.

As the Court held in Police Department v. Mosley, 408 U.S. 92,96 (1972):

> [G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views....There is an "equality of status in the field of ideas and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say."[9]

Schacht v. United States, 398 U.S. 58 (1970) is controlling. There, this Court applied the ban on viewpoint dis-

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[9] Accord Consolidated Edison Co. v. P.S.C., 447 U.S. 530, 537 (1980); Young v. American Mini-Theatres, supra, 427 U.S. at 67-68, n.10 (Stevens, J.).

crimination to a statute prohibiting the unauthorized wearing of military uniforms, except in a theatrical productions, provided only that "the [theatrical] portrayal does not tend to discredit that armed force."

The latter proviso was found to be unconstitutional. A "clause...which leaves Americans free to praise the war in Viet Nam but can send persons...to prison for opposing it, cannot survive in a country which has the First Amendment." 398 U.S. at 63. Likewise D.C.Code §22-1115 cannot co-exist with the First Amendment for it leaves American citizens free to praise foreign governments, but sends them to jail for criticizing them.

More recently, in Cornelius v. NAACP Legal Defense & Education Fund, 105 S.Ct. 3439 (1985), this Court upheld a restriction on participation in the Combined Federal Campaign to direct providers of

social services. This classification excluded "action" organizations, which engaged in litigation or lobbying to effect social change. This Court described the restriction as a reasonable and, hence, a constitutional, subject matter restriction in a non-public forum.

Notwithstanding this holding, the Court remanded the case for further fact-finding to determine whether the subject matter restriction masked illicit viewpoint discrimination: [T]he Government violates the First Amendment when it denies access to a speaker solely to suppress a point of view he espouses on an otherwise includable subject." 105 S.Ct. at 3451. Accord, U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 564 (1973).

Viewpoint discrimination is impermissible not only because the "government is forbidden to assume the task of ulti-

mate judgment, lest the people lose their ability to govern themselves," First National Bank of Boston v. Bellotti, 435 U.S. 765, 791, n.35, (1978) but also because viewpoint discriminatory rules:

> necessarily distort the ordinary workings of the "marketplace of ideas"....Such restrictions thus leave the public with only an incomplete--and perhaps inaccurate--perception of their social and political universe.

Stone, Restrictions of Speech, supra, 46 U.Chi.L.Rev. at 101. In a city such as Washington, the effect of a 500-foot restriction on speech critical of an embassy is to totally shut off speech, since there is practically no incentive to picket the Soviet Embassy in front of, say, a coffee shop on the next block. The impact of the viewpoint discrimination is not, as the majority below would have it, simply the fact that demonstrations have to take place 500 feet away.

In the real world, the question is whether there are to be demonstrations at all.

Because it is this distortion of the American political marketplace that the First Amendment forbids, it is not relevant as the court below asserted without citation to authority, 798 F.2d at 1462, that foreign ambassadors are an exception to the principle that listeners may not be shielded by government from speech with which they disagree, 798 F.2d at 1467.

Moreover, the Vienna Convention, §3, lists among the duties of diplomats:

> ascertaining by all lawful means, conditions and developments in the receiving state, and reporting them to the government of the sending state.

The Court of Appeals' conclusion that diplomats are not "listeners" or "accessible to political attack" in American political discourse on foreign affairs is thus simply incorrect as a mat-

ter of fact.[10]

C. None of the Court of Appeal's Justifications for Viewpoint Discrimination Withstand Scrutiny.

The court below attempted to avoid the overwhelming strength of petitioners' First Amendment challenge to the ban on odious placards in two ways. First, it denied that there was a distinction between content-based and viewpoint based restrictions on speech, and

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[10] Foreign diplomats are generally subject to the full legal regime of the country to which they are accredited, but may not be subject to criminal penalties for its violation. Vienna Convention on Diplomatic Relations §41(1), See 7 M.M. Whiteman, Digest of International Law pp 54-174 (1970). In this country, one of the governing legal principles is that government may not bar speech because a listener is made uncomfortable by it. It may be that the Court of Appeals was wrong in asserting that ambassadors are not bound by these principles.

Senator Pittman, sponsor of the bill which became §22-1115, relied on an older version of international law. He cited Kent's Commentaries for the proposition that foreign ambassadors were not subject to municipal law.

asserted that even viewpoint discrimination could be justified by a compelling interest. 798 F.2d at 1469. This is a claim utterly at odds with a long line of this Court's cases--culminating most recently in Cornelius and Schacht--but dating back to Niemotko v. Maryland, 340 U.S. 268 (1951) and Fowler v. Rhode Island, 345 U.S. 67 (1953),[11] in which the Court invalidated viewpoint discriminatory bans on access to public parks without any inquiry into possible justifications.

Second, the majority argued that the

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[11] This same principle underlies the prohibition, tracing back to the Court's earliest free speech cases, Cantwell v. Connecticut, 310 U.S. 296 (1940) and Schneider v. State, 308 U.S. 147, 163-64 (1939), invalidating statutes which vest standardless discretion in public officials to regulate speech. Such authority leaves open the possibility of censorship of viewpoints with which the official disagrees. In these cases as well, the Court has not considered justifications for the statutory scheme.

ordinance imposes only a de minimis restriction on speech, 798 F.2d at 1463, and hence was a permissible accommodation of the petitioners' Free Speech rights and the government's foreign policy concerns. This argument, too, is unavailing. There is no de minimis rule in free speech cases. Even if there were, government discrimination in the marketplace of ideas is hardly de minimis.

The availability of an alternative site is not entitled to any weight in the context of viewpoint discrimination, for "one is not to have the exercise of his liberty abridged on the plea that it may be exercised in some other place." Schneider v. State, 308 U.S. 147, 163 (1939). As recognized in Consolidated Edison Co. v. P.S.C., supra, 447 U.S. at 541, n.10, (1980), this Court has "consistently rejected the suggestion that a government may justify even a content--

based prohibition by showing that speakers have alternative means of expression." Accord Bolger v. Young's Drug Products Corp., 463 U.S. 60, 69, n.18 (1983).

Speech, as individual members of the Court have recognized, is not fungible. A rally at the doorstep of the institution with which one disagrees is not the same as a rally almost two football fields away. Grayned v. City of Rockford, supra. The views which petitioners seek to express are of a "kind in which the content or effectiveness of the message depends in some measure upon where or how conveyed." Young v. American Mini Theatres, Inc., 426 U.S. at 78, n.2 (Powell, J., concurring).

Petitioners in Brown v. Louisiana, 383 U.S. 131 (1966), could have demonstrated against the segregation of a library elsewhere than in the reading room

of the library. However, a demonstration there had infinitely greater impact on the marketplace of ideas. Similarly, petitioners in Grayned could have protested school segregation elsewhere, for example, at Board of Education headquarters, but a rally at the school was significantly more effective.

A small anti-Soviet rally elsewhere than at the Soviet Embassy is not likely to come to the attention of that embassy --nor is it likely to receive the attention of the domestic and foreign media. A demonstration against the Soviet Union at the headquarters of Young Americans for Freedom is hardly newsworthy. A demonstration at the Embassy has heightened visibility, and is much more likely to be covered in the new electronic marketplace of ideas, the functional equivalent of the village square of an earlier

day.[13]

D. The "Congregating" Prohibition is Likewise Invalid Under Well-Settled Principles.

The second branch of the ordinance forbids persons to congregate within 500 feet of an embassy after being ordered to disperse by the District of Columbia Police. No standards constrain this grant of authority to the police to exercise a veto over the exercise of First Amendment rights.

Almost immediately after the enactment of this ordinance in 1937, this

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[13] The Court of Appeals suggested that, under City of Renton v. Playtime Theatres, supra, 106 S.Ct 929, the challenged ordinance may not even be a content based statute since it is not aimed at speech, but at its secondary effects on "the surrounding community," 798 F.2d at 1469--in Renton, the social decay which accompanies the clustering of adult movie houses. D.C. Code §22-1115 is necessarily aimed at limiting speech expressing certain viewpoints. Its purpose and effect is the suppression of speech, pure and simple, not at some secondary environmental effects.

Court enunciated the principle that government may not confer standardless discretion on police officials to outlaw speech. Cantwell v. Connecticut, supra; Schneider v. State, supra. In Shuttleworth v. City of Birmingham, 394 U.S. 149, 150-151 (1969) this Court summed up its cases:

> This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional. "It is settled by a long line of recent decisions of this court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official--as by requiring a permit or license which may be granted or withheld in the discretion of such official--is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." (Citations and footnote

omitted).[14]

Accord Southeastern Promotions, Ltd. v. Conra, supra, 420 U.S. at 552-53.

The Court of Appeals attempted to escape the implication of this well-settled rule by reading this section as 'authorizing a dispersal order only

> for reasons having to do with the nearby embassy. In a word, the purposes of the statute [protecting the security and dignity of the embassy] supply the necessary criteria just as much as a 'breach of the peace ordinance does.'
>
> 798 F.2d at 1472.

Precisely. What the Court of Appeals failed to notice, however, was that this Court has invariably refused to sustain convictions for picketing under breach of peace ordinances which, like the second clause of §22-1115, have an "ambulatory sweep," Gregory v. Chicago,

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[14] The omitted footnote listed some 16 cases standing for this proposition.

394 U.S. 111, 130 (1969) (Harlan, J., concurring), and, consequently, confer unlimited discretion on local officials.[15]

Broad generalizations about the likelihood of disruption, such as those predicated upon the fact that a placard calls an embassy into public odium, do not carry the government's burden of justifying restrictions on speech. "Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classification, especially those based on subject matter." Police Dept. v. Mosley, supra, 408 U.S. at 100-01.

The security justification fails as

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[15] See e.g., Edwards v. South Carolina, supra; Cox v. Louisiana, supra; Brown v. Louisiana, supra; Thornhill v. Alabama, 310 U.S. 88 (1940); Cantwell v. Connecticut, supra, 310 U.S. at 307-10.

well. To justify a governmental restriction on speech, a regulation must be "shown to be a precisely drawn means of serving a compelling state interest." Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 540 (1980). The security justification fails this test for it is not "precisely drawn."

The government's asserted interest in banning congregating is to provide a buffer zone so that embassies can be defended against attacks. But nothing in the government's affidavits explains why that interest is relevant only when hostile parties are the demonstrators, or, as discusssed at, p.45, infra, only in the District of Columbia.

The Government's affidavits unanimously--if predictably--explain that a 500-foot speech-free zone is necessary to protect the security of embassies. They do not even address the question of why

that barrier is contingent either upon the viewpoint expressed or the unfettered discretion of the police,[16] or why local police forces elsewhere in the country presumably less experienced than either the Secret Service or the District of Columbia police in protecting diplomatic establishments, are able to function without the unconstitutional features of §22-1115. These affidavits defend the ordinance only by ignoring its obnoxious features.

Nor do the affidavits explain why the most obvious alternative to a ban on

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[16] Neither the ordinance itself nor the Circuit Court's construction of it limit the authority of the police to order dispersals only when there is an identifiable and substantial risk of immediate danger to a particular embassy. Compare Thornhill v. Alabama, supra, 310 U.S. at 105 ("no clear and present danger of violence or disruption"); Edwards v. South Carolina, supra; Cox v. Louisiana, supra, 379 U.S. at 350 with Feiner v. New York, 340 U.S. 315, 321 (1951) (police "faced with a crisis").

speech--an increase in the number of security personnel--would not satisfy the government's security interests, cf. Terminiello v. Chicago, 337 U.S. 1 (1949).

E. Both Sections of the Ordinance Suffer From Vagueness

The first provision of the ordinance requires a determination of what signs are "designed or adapted" to bring an embassy into public odium. The congregating provision requires an identical determination under the construction given it by the court below, 798 F.21 at 1471. In neither case does the reference to "odium" establish "narrow, objective and definite" standards necessary to uphold such statutes under Shuttleworth v. City of Birmingham, supra.

What constitutes an impairment of the dignity of an embassy is too vague, too indefinite, to pass First Amendment

muster. How is a police officer to determine whether the Soviet Union is brought into public odium by a demonstration calling attention to the fact that abortion is unregulated in that nation? Planned Parenthood would not think it was, although a pro-life group surely would. What of a Nazi group which gathers before the Austrian Embassy to announce "Waldheim: The Right Choice For Real Austrians?" What of Hassidic Jews congregating before the Israeli embassy proclaiming that "The Torah is the Only Law For Israel?" What of negative statements which the bulk of public probably does not care deeply about--say "Canada Slaughters Baby Seals."

To be sure, there are slogans which are intended to bring a foreign government into public odium. But many, if not most issues sparking demonstrations are regarded by the public as fairly debat-

able. The expression of differing points of view on such issues does not generate "odium" --defined as "strong dislike, contempt or aversion," American Heritage Dictionary, 2d College Edition, (1982). Yet §22-1115 grants the police the authority to ban all critical placards.

Section 22-1115 falls far short of setting definite and objective criteria for regulating speech which a lone policeman, or those responsible for issuing permits for acceptable placards, see n.3, supra, will be able to apply in even-handed fashion, the sine qua non of a consitutionally acceptable ordinance.

F. The Labor Exemption Cannot Be Squared with Either the Interest in Security, or Protecting the Dignity, of Embassies

Neither of the government's justifications can explain the exemption for labor picketing. D.C. Code §22-1115, like the ordinances invalidated in Carey

v. Brown, supra, and Police Dep't v. Mosely, supra, exempts labor picketing, and is, like those ordinances, invalid. Labor picketing also can result in violence and also can bring an embassy into public odium, yet it remains permissible. A placard reading "Britain Exploits Its Workers" is permissible if aimed at the Embassy's own employment practices, but not if directed to the Thatcher government's domestic labor policies.

The difference between the two is surely less than obvious, and cannot in any event justify the different treatment of protected speech, notwithstanding the contrary decision of the District Court in Jewish Defense League v. Washington, 347 F.Supp. 1300 (D.D.C. 1972)(3 judge court).

Labor picketing can surely bring an embassy into public odium. It is equally apparent that it can pose a threat to the

security of an embassy. Nothing in international law purports to allow an embassy to be called into public odium or have its security endangered over such a dispute over what the JDL court called a "domestic matter," 347 F.2d at 1302. That Congress chose to ignore international law when it was politically convenient for it to do so fundamentally undermines the asserted justifications for the ordinance.

II. INTERNATIONAL LAW PROVIDES NO JUSTIFICATION FOR §22-1115

The court below accepted Respondent's assertion (Response to Petition for Certiorari at 5) that the ordinance satisfied the compelling interest in complying with international law as codified in the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95 (hereafter "Vienna Con-

vention").

Section 33(2) of the Convention provides:

> The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

The Government has a legitimate interest under the Convention in protecting the dignity and security of embassies. It does not follow that there are no constitutional restrictions on what Congress may legislate under the Vienna Convention. The Convention undoubtedly requires the appropriation of sufficient sums to provide for a police force large enough to protect the security and dignity of embassies. Congress would also have the power to impose reasonable noise limits, limit the number of pickets, or even limit demonstrations to certain

hours, Concerned Jewish Youth v. McGuire, 621 F.2d 471 (2d Cir. 1980).

The Court of Appeals held that §22-1115 must be upheld because 1) it was enacted under Congress' power to define offenses against international law, Art. 1,§8,cl.8; 2) international law in fact requires a ban on picketing; 3) Congress weighed First Amendment interests in the balance before enacting the statute; 4) deference is particularly appropriate in matters touching upon foreign affairs; and 5) it imposes only minor restrictions on speech. We consider each of these assumptions except for the first, which is undisputed, and the last, discussed supra at p.24.

A. International Law Does Not Require A Selective Ban On Demonstrations Outside Embassies

When Congress enacted §22-1115 in 1937 it thought it was enforcing the requirements of international law. 81

Cong. Rec. 8586-8594 (1937). As international law stood then, it might have been. See Harvard Codification of International Law, 26 Am. J. Int. Law 56-57 (1932). Today compliance with international law does not require the broad prohibitions embodied in §22-1115.

In the first place, the justification for the special protections accorded embassies has changed over the years. When §22-1115 was enacted, special protection was justified either on the ground of "extraterritoriality" (that is, that the embassy is in contemplation of law within the territory of the sending country) or that it "represented" (i.e. personified) the foreign sovereign.

The special protection requirement is today justified on functional grounds, L. Henkin, R.C. Pugh, O. Schachter, & H. Smit, International Law, p. 530 (1980)--that is, protecting the ability of the

embassy to carry out its diplomatic functions. An orderly demonstration outside an embassy would no more interfere with its functioning than an orderly demonstration outside a school interferes with education or a lone picket outside this Court intereferes with its work.

Congress has repeatedly indicated that a ban on picketing or demonstrations is now unnecessary to fulfill the United States' obligations under international law. Twice in the last fifteen years it has adopted legislation to strengthen the protection of diplomats. Twice it broadened the rights of American citizens to picket foreign embassies beyond what is allowed by §22-1115.

In 1972, Congress passed an Act[17] "to provide for expanded protection of foreign officials." As enacted, it

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[17] Codified as 18 U.S.C. §112

punished

> any person who within the United States but outside the District of Columbia and within one hundred feet of any building or premises belonging to or used or occupied by a foreign government or by a foreign official for diplomatic or consular purposes...
> (1) parades, pickets, displays any flag, banner, sign, placard, or device, or utters any word, phrase, sound, or noise, for the purpose of intimidating, coercing, threatening, or harassing any foreign official or obstructing him in the performance of his duties, or
> (2) congregates with two or more other persons with the intent to perform any of the aforesaid acts...[18]

Not satisfied that this section adequately protected First Amendment ment rights, Congress further provided that the Act was not to be construed to abridge First Amendment freedoms.[19]

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[18] Senate Conference Report, 92-1105, 92d Cong. 1st. Sess. (1972), reprinted in 1972 U.S. Code, Cong. & Admin. News 4316, 4328.

[19] "Nothing contained in this sec-

Although the Senate Conference Committee described this provision as similar to D.C. Code §22-1115, it was significantly narrower in three key respects. The distances involved were far less; it required a "purpose of intimidating, coercing, threatening or harassing any foreign official" to establish a violation of both the picketing and congregating provisions; and, unlike §22-1115, which focuses on the suppression of communication, §112 focused precisely on the "peace and dignity" of embassies.

The scienter ("intent to harass") requirement of §112 prevented police officials from routinely banning demonstrations, even those in which hostile placards were displayed, if they were not displayed with an intent to harass, but

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tion shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment..." 18 U.S.C. §112(e).

to express a point of view. If, as respondents necessarily argue, a total ban on adverse picketing is necessary to comply with international law, the former §112, intended to facilitate compliance with international legal requirements protecting diplomatic establishments, in fact sanctioned a massive breach of this country's obligation under international law.

Four years later, Congress returned to the question of demonstrations in the vicinity of embassies, again in the context of increasing American compliance with its obligation to protect diplomatic establishments and diplomats. It adopted the present 18 U.S.C.§ 112, which omits all prohibitions on picketing or displaying placards, or congregating for that purpose, even within 100 feet of an embassy, thus compounding, in Respondents' view, the breach of international law.

The House Committee explained that the prior "language raises serious Constitutional questions because it appears to include within its purview conduct and speech protected by the First Amendment." H.R. 94-1614, 94th Cong., 1st Sess., reprinted in 1976 U.S. Code, Cong. Admin. News 4480, 4484 (1976).

Outside the District of Columbia, a demonstration even within 100 feet of a diplomatic establishment is both constitutionally protected and not in violation of the establishment's rights under international law, CISPES v. F.B.I., 770 F.2d 468 (5th Cir. 1985).

A demonstration held within 500 feet of such an establishment within the District of Columbia, however, is not, according to Respondents, constitutionally protected, and would violate international law. Surely, for international law dignity purposes, it is irrelevant wheth-

er a building subject to the Vienna Convention is in Washington, D.C., its suburbs, New York City or Des Moines, Iowa.

The United States Department of State, which on occasion points to §22-115 as implementing §22 of the Vienna Convention, 798 F.2d at 1458, likewise rejects foreign government protests against adverse demonstrations near diplomatic and consular establishments on the ground that such activity is protected under the First Amendment. 7 M.M. Whiteman, Digest of Int. Law, 384-85 (1970).

Thus, in responding to a Soviet protest against a hostile rally held outside one of its consulates, the Department wrote that "it cannot associate itself with any attempt to abrogate the constitutional right of residents of the United States to gather in peaceful assembly and to express their beliefs and convic-

tions." See also IV G.H. Hackworth, Digest of International Law, p. 715-16 (1942) (similar views of Federal Communications Commission); cf. CISPES v. FBI, supra, 770 F.2d at 474 (statement of U.S. Attorney that 18 U.S.C. §112 does not ban placards criticizing embassy or diplomats).

The actual experience and actions of the United States ought to weigh more heavily in this Court's balance than the predictable, Cassandra-like, predictions of harm contained in the respondents' affidavits.

If there is to be deference to legislative decisions about foreign policy and international law, and the way these interests are balanced against the First Amendment, then it should be to the most recent Congressional pronouncement on that subject and to the State Department's actual practice, not to a fifty

year[20] old ordinance, based on now-dated views of both international and constitutional[21] law.

Paradoxically the international law argument also proves too much. The majority agreed that it would be "unthink-

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[20] The court below suggested that Congress left §22-1115 intact because of the greater concentration of embassies in the District or because Congress exercises greater control over the affairs of the District of Columbia than any other place. 798 F.2d at 1463, n.9. Not only is this a disfavored argument from legislative inaction, but what either of these concerns have to do with protecting the dignity of embassies is left unsaid. Moreover, after 18 U.S.C. §112 was adopted, Congress granted home rule to the District of Columbia, District of Columbia Self-Government and Governmental Reorganization Act, P.L. 93-198, 87 Stat. 774(1973). This is the most likely explanation of why Congress has not repealed §22-1115.

[21] As noted above, p.12, n.5, the Congress relied on Davis v. Massachusetts, a case which has never been formally overruled, although whether or not it should be was presented in Fowler v. Rhode Island, supra. It is nonetheless clear that Davis is inconsistent with the last half-century of First Amendment adjudication.

able" to ban speech adverse to a diplomat (and not merely an embassy) anywhere in the United States, 798 F.2d at 1463, notwithstanding the fact (not mentioned by the court) that §29 of the Vienna Convention requires the protection of the "dignity" of diplomats.

Some nations construe §29 to require a ban on speech offensive to diplomats. Harvard Codification of Internation Law, 26 Am.J.Int.Law 57(1932). Earlier in this country's history it did so as well, the libel of a diplomat being treated as a crime. 1 Op. Atty. Gen. 52 (1794); 1 Op. Atty. Gen. 72 (1794); Res. v. De-Longchamps, 1 Dallas 110 (1784).

International law, however, creates no inflexible rule requiring a state to ban speech aimed at establishments or individuals protected under the Vienna Convention if such a rule is inconsistent with municipal law protecting freedom of

speech, Przotacznik, Special Protection of Diplomatic Agents, 26 Revue de Droit International (October-December 1972) 270, 284:

> As regards attacks upon diplomatic agents by newspapers, it should be observed that they can easily be prohibited wherever the press is subject to government control, but where the press is free the government of the receiving State is in a difficult situation. Since, on the one hand, it has a duty to respect the freedom of the press and on the other hand, it has a duty to afford to diplomatic agents special protection against any attack on their persons, freedom, or dignity. This duty of special protection requires the receiving State to prevent any violation of the inviolability of diplomatic agents including attack upon them by the press. It follows that the municipal legislations of States vary as to the scope of acts, which are punishable as offenses against diplomatic agents.

Congress' power to "define ... offenses against the Law of Nations" ordinarily allows it to choose between competing visions of international law. But

this is not an ordinary case, for the choice Congress made (albeit half a century ago) trenches upon constitutionally protected rights. Under these circumstances, the Constitution should be held to deny to Congress the power to define an "Offense ...against the Law of Nations" in a way which is, at the same time, an "offense" against the First Amendment, particularly since these are less intrusive means of achieving the government's legitimate interests.

B. Deference to the Legislative Judgment Has No Place In This Case

The court below did not accept this analysis, nor did it give any substantial weight to the important First Amendment interests at issue in this case. Rather, having denigrated the First Amendment interests involved, 798 F.2d at 1463, it held that this was an "unusually strong case for judicial deference" to the Exe-

cutive and Congress. 798 F.2d at 1459. Citing a variety of cases, it held that "it would be quite improper for the judiciary to disregard international obligations that are inseparable from our nationhood." 798 F.2d at 1459-60.

None of the cases cited by the court justifies granting of the deference normally accorded the Executive or the Legislature on matters of foreign policy to a case in which American citizens are engaged in purely domestic conduct clearly protected by the First Amendment.

Several of the cases cited by the Court of Appeals dealt with questions of whether the Constitution created in a particular branch a power that branch claims to have exercised. Others addressed problems of the allocation of power among the judiciary, Congress and the executive, see, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398

(1964); Goldwater v. Carter, 444 U.S. 996 (1979).

Most of the remainder, with the exception of Regan v. Wald, 468 U.S. 222 (1984), dealt with Congressional control over immigration, which this Court has treated as presenting distinct constitutional problems. Indeed, this Court has frequently suggested that, were it writing afresh, it might well impose some constitutional safeguards on Congress' efforts to control immigration. Fiallo v. Bell, 430 U.S. 787, 795, n.6 (1977); Galvan v. Press, 347 U.S. 522 (1954).[22]

The court below cited Baker v. Carr, 369 U.S. 186, 211-13 (1962) as establish-

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[22] Kleindeinst v. Mandel, 408 U.S. 753 (1977) was not, as the majority would have it, a First Amendment case, 798 F.2d at 1459, n. 6, but an immigration law case. In any event, the Court there decided only that the government had asserted a legitimate non-speech reason for denying Mandel a visa, and that deference did not allow it to second guess that facially constitutional reason.

ing the principle of nonjusticiability on matters of foreign affairs, but its selective quotation of Baker distorts its holding. This Court warned in Baker that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance," Id at 211. And each of the examples the Court gave in Baker v. Carr as requiring deference involved the political allocation of powers between Congress and the Executive, not claims of individual rights.

Haig v. Agee, 453 U.S. 280 (1981), also cited by the Court of Appeals, also does not support deference here. In considering whether the State Department could revoke the passport of a rogue CIA agent, the Court did speak of its obligation to defer to the Executive in matters of foreign affairs, but only in regard to the question of whether a statute autho-

rized the Department of State to cancel a passport because the holder engaged in conduct prejudicial to the United States. The deference language was conspicuously absent in this Court's discussion of Agee's constitutional claims, 453 U.S. at 306-10.

Similarly, where individuals were denied passports because of their political activities, deference was no barrier to the vindication of their constitutional rights, Zemel v. Rusk, 381 U.S. 1 (1965); Kent v. Dulles, 357 U.S. 116 (1958), notwithstanding claims that granting them passports would have an adverse impact on foreign policy.

C. The Foreign Affairs Power Is Not An Exception To The First Amendment

Only by invoking an extreme version of judicial deference could the Court below avoid the invalidation of §22-1115. And in doing so, it violated another fun-

damental proposition of American government. In foreign affairs, as well as in everything else it does, the Government must act in accordance with the Constitution:

> The United States is entirely a creation of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations of the Constitution.

Reid v. Covert, 354 U.S. 1, 5-6 (1957).

Even if international law unambiguously required the silencing of picketers, the United States would be powerless to comply with that aspect of international law in that spect. For precisely this reason, the United States, in acceding to the Convention on the Elimination of All Forms of Racial Discrimination expressed a reservation to a provision which banned racist speech on the ground that it conflicted with the First Amendment. See, Bollinger, The Tolerant Soci-

ety, supra, at 253-54, n.66, citing L. Sohn and T. Burgenthal, International Protection of Human Rights, 861-62. See also, L. Henkin, Foreign Affairs and the Constitution, p. 254 and n.8.

As long ago as Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936), the foundation of this Court's modern treatment of the foreign affairs power, this Court held that even the presidential foreign affairs power was limited by the provisions of the Constitution. And in Perez v. Brownell, 356 U.S. 44,58 (1958), this Court reiterated this proposition:

> Broad as the power in the National Government to regulate foreign affairs must be, it is not without limitation. The restriction confining Congress in the exercise of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations.

The court below argued that it was not holding that international law was

superior to the Constitution, but rather that Congress was entitled to balance free speech rights against the dignity interests protected by international law. 798 F.2d at 1463. This approach reduces balancing to a tautology.

The Constitution commands Congress to make no law "abridging the freedom of speech." If one accepts the argument made by the court below, this command is to be balanced against the need to suppress speech because of the reaction of some listeners.[23] The need for a heckler's veto was at least implicitly rejected by those who adopted the First Amendment. The heckler's veto cannot be resurrected by the courts or the Congress on an ad hoc basis under the guise of balancing.

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[23] As we have demonstrated above, p.30, the asserted security interest cannot sustain this ordinance.

In order to be a cognizable compelling interest in the Free Speech context, an interest must be one other than in the supression of speech, U.S. v. O'Brien, 391 U.S. 367, 377 (1968). In upholding a statute making it criminal to destroy a draft card, this Court was at pains to explain that the statute was not aimed at the suppression of speech:

> The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In Stromberg v. People of State of California, 283 U.S. 359, for example, this Court struck down a statutory phrase which punished people who expressed their "opposition to organized government" by displaying "any flag, badge, banner, or device." Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct. See also NLRB v. Fruit and Vegetable Packers and Warehousemen, 377 U.S. 58, 79 (1964) (concurring opinion of Black, J.).

Unlike the nonspeech interests protected by the O'Brien statute, the interest in protecting the dignity of embassies is in the suppression of speech. To allow that interest to be balanced against the First Amendment is for the Courts to restrike the constitutional bargain.

CONCLUSION

For the reasons stated, the judgment must be reversed.[24]

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[24] Because 18 U.S.C. §112 does not by its terms apply to the District of Columbia, if this Court invalidates §22-1115 as unconstitutional, it should stay its judgment for a reasonable period of time to allow for the enactment of appropriate legislation applicable to the

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District. See Northern Pipeline Construction Company v. Marathon Pipe Line Co., 458 U.S. 50, 88-89 (1982).

AMICUS CURIAE

BRIEF

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No. 86-803

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL BOOS, *et al.*,
Petitioners,

v.

MARION S. BARRY, JR., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA, *AMICI CURIAE*

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TABLE OF CONTENTS

Page

INTEREST OF AMICI.....1

SUMMARY OF ARGUMENT.....2

ARGUMENT.....3

I. SECTION 22-1115 IS UNCONSTITUTIONAL ON ITS FACE. 4

A. The Statute Prohibits a Wide Range of Expression..... 4

B. The Statute is Both Content- and Viewpoint Discriminatory. 9

C. The Statute is Both Overinclusive and Underinclusive 10

D. The Statute is Impermissibly Vague..... 11

E. The Statute Vests Excessive Discretion in the Police.....13

II. SECTION 22-1115 IS NOT SUPPORTED BY ANY COMPELLING INTEREST.....14

A. Congress has Determined that the Statute is of Questionable Constitutionality and is Not Necessary to Serve any Significant National Interest.....14

B. Considerations of Safety and Security Do Not Sustain the Statute.....17

C. The Interest in Adhering to International Law Does Not Sustain the Statute.....21

1. The Founders Did Not Believe that the Law of Nations Required Any Restrictions on Speech.....22

2. The Vienna Convention Does Not Support the Statute. 23

3. The British Government Has Concluded that a Law Like Section 22-1115 Would be Improper.....25

4. Even if Section 22-1115 Were Supported by International Law, it Would be Unconstitutional.....28

D. No Legitimate Interest Supports the Exemption for Labor Picketing.....29

CONCLUSION.....30

TABLE OF AUTHORITIES

Page

CASES:

Alexander v. *Alexandria*, 5 Cranch 1 (1809) 16

Arkansas Writers' Project, Inc. v. *Ragland*, 55 U.S.L.W. 4522 (U.S. April 22, 1987) 9, 14

Bridges v. *California*, 314 U.S. 252 (1941).....9

Cardillo v. *Doubleday & Co., Inc.*, 518 F.2d 638 (2d Cir. 1975) 12

Carducci v. *Regan*, 714 F.2d 171 (D.C. Cir. 1983) 22

Carey v. *Brown*, 447 U.S. 455 (1980) 3, 9, 28, 29

Chief of Capitol Police v. *Jeanette Rankin Brigade*, 409 U.S. 972 (1972).....28

Clark v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984) 3, 4

Connally v. *General Construction Co.*, 269 U.S 385 (1926) 12

Cornelius v. *N.A.A.C.P. Legal Defense and Educational Fund, Inc.*, 105 S. Ct. 3439 (1985) 9

De Geofroy v. *Riggs*, 133 U.S. 258 (1890) 28

FCC v. *League of Women Voters*, 468 U.S. 364 (1984) 4

Flast v. *Cohen*, 392 U.S. 83 (1968) 28

Goldman v. *Weinberger*, 106 S. Ct. 1310 (1985) 10

Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 12

Gregory v. *Chicago*, 394 U.S. 111 (1969) 10

Heffron v. *Int'l Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) 4

Kolender v. *Lawson*, 461 U.S. 352 (1983) 12

Lamont v. *Postmaster General*, 381 U.S. 301 (1965) 28

Lipkin, et al. v. *United States*, (D.C. Ct. App. Nos. 86-190 to 86-198) 8

M.A.P. v. *Ryan*, 285 A.2d 310 (D.C. App. 1971) 11

Marsh v. *Chambers*, 463 U.S. 783 (1983) 23

McBoyle v. *United States*, 283 U.S. 25 (1931) 11

Minnesota State Board for Community Colleges v. *Knight*, 465 U.S. 271 (1984) 8

Parker v. *Levy*, 417 U.S. 733 (1974) 9

Perez v. *Brownell*, 356 U.S. 44 (1958) 28

Philadelphia Newspapers, Inc. v. *Hepps*, 106 S. Ct. 1558 (1986) 3

Police Dept. of Chicago v. *Mosley*, 408 U.S. 92 (1972) 3, 9, 10, 21, 28, 29

Procunier v. *Martinez*, 416 U.S. 396 (1974) 8

Red Lion Broadcasting Co. v. *F.C.C.*, 395 U.S. 367 (1969) 16

Regan v. *Time, Inc.*, 468 U.S. 641 (1984) 14

Regina v. *Roques* (Bow Street Magistrate's Court, Aug. 1, 1984) 27

Reid v. *Covert*, 354 U.S. 1 (1957) 28

Rostker v. *Goldberg*, 453 U.S. 57 (1981) 10, 16

Saia v. *New York*, 334 U.S. 558 (1948) 13

Schacht v. *United States*, 398 U.S. 58 (1970) 28

Schad v. *Borough of Mount Ephriam*, 452 U.S. 61 (1981) 4

Shuttlesworth v. *City of Birmingham*, 394 U.S. 147 (1969) 13

Smith v. *Goguen*, 415 U.S. 566 (1974) 12

Strinko v. *United States*, (D.C. Ct. App. No. 85-1330) 8

Terminiello v. *Chicago*, 337 U.S. 1 (1949) 10

Thornhill v. *Alabama*, 310 U.S. 88 (1940) 4

United States v. *Brown, et al.*, Crim. Nos. M-14345-81 to M-14350-81 (D.C. Super. Ct. 1981) 2, 5

United States v. *Flanagan*, Crim. No. 16283-69A (D.C. Gen. Sess. 1969).....6

United States v. *Grace*, 461 U.S. 171 (1983) 4

United States v. *O'Brien*, 391 U.S. 367 (1968) 4

United States v. *Mykytyn, et al.*, Crim. Nos. M-5664-85 to M-5673-85 (D.C. Super. Ct. 1985) 2

United States v. *Travers*, Crim. No. 42935-69 (D.C. Gen. Sess. April 2, 1970), *reprinted in* 118 Cong. Rec. 31033 (1972) ...5, 6

United States v. *Wiltberger*, 5 Wheat. 76 (1820) 30

Wisconsin v. *Pelican Ins. Co.*, 127 U.S. 265 (1888) 23

Zaimi v. *United States*, 476 F.2d 511 (D.C. Cir. 1973)..2, 5, 7, 11

CONSTITUTION, TREATIES, STATUTES AND REGULATIONS:

U.S. CONST. ART. I § 8 .....3, 28

U.S. CONST. AMEND. I .....*passim*

18 U.S.C. § 112 .....16, 18, 24

28 U.S.C. § 2403(a) 15

Act of April 30, 1790, 1 Stat. 112 23

Pub. L. No. 99-399, 100 Stat. 853 (Aug. 27, 1986)..... ..23

Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, T.I.A.S. No. 7502 (1961).....3, 23, 24, 25

D.C. Code § 1-233.....15

D.C. Code Title 11.....15

D.C. Code § 22-1115.....*passim*

D.C. Code § 22-1107.....18

D.C. Code § 22-1116 .....14, 29

D.C. Code § 22-1121 18

D.C. Code § 22-3102 18

36 C.F.R. § 50.19(b)(1) 19

36 C.F.R. § 50.19(e)(10) 20

U.S. Capitol Police Regulations, §§ 156, 159 (1976) 19

D.C. Police Regs. Art. 6, § 2(a) (1981) 18

CONGRESSIONAL MATERIALS:

81 Cong. Rec. (1937).....2, 4, 7, 21, 24, 29

83 Cong. Rec. (1938).....4

118 Cong. Rec. (1972) 24

132 Cong. Rec. (1986) 15, 25

H.R. 4151 (the "Omnibus Diplomatic Security and Anti-Terrorism Act of 1986") 15, 17

S. Rep. No. 92-1105, *reprinted in 1972 U.S. Code Cong. & Admin. News* 4316.....24

District of Columbia Appropriations for Fiscal Year 1986: Hearings on H.R. 3067 Before the Subcomm. on the District of Columbia of the Senate Comm. on Appropriations, 99th Cong., 1st Sess. 68 (1985) 2, 6, 18

The Prosecution of Demonstrators Outside the Soviet Embassy: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 27 (1986) 2, 8, 9

UNITED KINGDOM MATERIALS:

The Abuse of Diplomatic Immunities and Privileges: the First Report from the Foreign Affairs Committee in the Session 1984-85 (1984).....26, 27

Diplomatic Immunities and Privileges: Government Report on Review of the Vienna Convention on Diplomatic Relations, Cmnd. 9497, (1985).....25, 27

Diplomatic Immunities and Privileges: Minutes of Evidence taken before the Foreign Affairs Committee (1984) 26

Metropolitan Police Act 1839, 2 & 3 Vict., ch. 47.....25

Public Order Act 1936, 1 Edw. 8 & 1 Geo. 6, ch. 6.....25

Public Order Act 1986, ch. 64.....27

Review of Public Order Law, Cmnd. 9510 (1985).....27

The Times (London), Aug. 2, 1984.....27

MISCELLANEOUS:

Bill No. 7-59, the "Protection of Foreign Officials, Official Guests, and Internationally Protected Persons Amendment Act of 1987" (D.C. Council introduced Jan. 20, 1987) 16

Black's Law Dictionary (rev. 4th ed. 1968) 12

E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (1976).....23

Diplomatic Intercourse and Immunities, II *Yearbook of the Int'l Law Comm'n 1956*, U.N. Doc. A/CN.4/98 24

The Federalist No. 42 (C. Rossiter ed. 1961) 22

Minutes of 396th Meeting of the International Law Commission (Diplomatic Intercourse and Immunities), I *Yearbook of the Int'l Law Comm'n 1957* at 63, U.N. Doc. A/CN.4/91.....24

1B *Moore's Federal Practice* ¶ 0.402[1] (2d ed. 1982) 6

M. Nimmer, *Nimmer on Freedom of Speech* (1984).....8

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA, *AMICI CURIAE*

INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, non-profit membership organization dedicated to upholding and protecting the First Amendment rights of all persons, irrespective of their views. The ACLU's interest in D.C. Code section 22-1115 goes back to the law's inception, in 1937, when the ACLU sent a telegram to the Chairman of the Senate Foreign Relations Committee:

> demanding [an] open public hearing . . . and . . . express[ing] our considered opposition [to the bill] on grounds that the measure violates the letter and spirit of constitutional rights.

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[1] Letters from counsel for petitioners and respondents consenting to the filing of this brief have been filed with the Clerk of the Court.

81 Cong. Rec. 8588 (August 10, 1937). The request for a hearing was denied.

The American Civil Liberties Union of the National Capital Area is the Washington, D.C., area affiliate of the ACLU, and has long been active in urging the repeal or judicial invalidation of this statute. Nearly twenty years ago, the ACLU/NCA challenged the constitutionality of section 22-1115, but the case was decided on other grounds. *Zaimi* v. *United States*, 476 F.2d 511 (D.C. Cir. 1973). More recently, the ACLU/NCA has represented several persons arrested for participating in peaceful demonstrations violative of section 22-1115,[2] and has testified before Congressional committees considering the validity and enforcement of the statute.[3]

SUMMARY OF ARGUMENT

1. *The Statute is Facially Unconstitutional.* Section 22-1115 is a catalogue of First Amendment infirmities. It directly suppresses a substantial quantity and variety of speech in the quintessential public forum of the public streets, and it does so based not only on the content but the viewpoint of the speech. It is overbroad, regulating conduct that cannot possibly threaten the interests it allegedly serves, and simultaneously underinclusive, failing to address conduct that directly threatens those same interests. It is also notably vague, delegating to the police effectively untrammeled discretion in interpretation and enforcement, which have, consequently, been inconsistent and abusive.

2. *No Compelling Interest Supports the Statute.* In recent legislation, Congress has expressly disavowed any imperative national interest in section 22-1115. Neither does any compelling interest of the District of Columbia support the law. As the court of

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[2] *See United States* v. *Brown, et al.*, Crim. Nos. M-14345-81 to M-14350-81 (D.C. Super. Ct. 1981); *United States* v. *Mykytyn, et al.*, Crim. Nos. M-5664-85 to M-5673-85 (D.C. Super. Ct. 1985).

[3] *See District of Columbia Appropriations for Fiscal Year 1986: Hearings on H.R. 3067 Before the Subcomm. on the District of Columbia of the Senate Comm. on Appropriations*, 99th Cong., 1st Sess. 48 (1985); *The Prosecution of Demonstrators Outside the Soviet Embassy: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 104 (1986).

appeals noted, the statute was not designed to, nor does it sensibly, serve the interest of protecting the safety of diplomats, which is simply not threatened by most of the conduct the law prohibits.

Nor does section 22-1115 carry out our nation's obligation to adhere to international law. As both the 1st and 99th Congresses recognized, no infringement on freedom of speech is necessary to fulfill that responsibility. This conclusion is also supported by the legislative history of the 1961 Vienna Convention on Diplomatic Relations, by Congressional action to implement that Convention, and by the practice of other nations, including the United Kingdom, which recently addressed this very issue. In any event, even when Congress acts under Art. I § 8 of the Constitution to "define Offenses against the Law of Nations," it must act within the constraints of the First Amendment.

Finally, no compelling interest supports the statute's exemption for labor picketing. Under the rule of *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92 (1972), and *Carey* v. *Brown*, 447 U.S. 455 (1980), which are squarely on point, the statute cannot stand.

ARGUMENT

Section 22-1115 of the District of Columbia Code is an unabashed prohibition of speech and assembly. The District of Columbia thus bears the burden of demonstrating that it is nevertheless constitutional. *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984); *Philadelphia Newspapers, Inc.* v. *Hepps*, 106 S. Ct. 1558, 1564 (1986). No sufficient interest of the District of Columbia Government has been established, either by logic or evidence, to overcome that repugnance.[4] Accordingly, the statute should be struck down.

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[4] Section 22-1115 is a local law, and as we show in Part II-A below, Congress has formally renounced any continuing federal need for its existence. Thus, the question presented is whether the legitimate interests, not of the United States but of the District of Columbia, are sufficient to sustain the statute.

I. SECTION 22-1115 IS UNCONSTITUTIONAL ON ITS FACE.

Enacted in 1938 without a committee hearing in either House of Congress and without debate in the House and only cursory debate in the Senate,[5] section 22-1115 is virtually a law professor's examination question on the variety of ways in which a statute can violate the First Amendment. It does not restrict speech only incidentally to a valid regulation of other conduct, compare *United States* v. *O'Brien*, 391 U.S. 367 (1968); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984), but is a criminal prohibition of speech *simpliciter*, *see Thornhill* v. *Alabama*, 310 U.S. 88 (1940). The speech it bans does not lie near the periphery of the First Amendment, compare *Schad* v. *Borough of Mount Ephriam*, 452 U.S. 61 (1981), but is political speech that falls within that amendment's core protection, *see FCC* v. *League of Women Voters*, 468 U.S. 364, 375-76 (1984). The law does not restrict expressive activity only where such activity would be inconsistent with "the characteristic nature and function" of a particular area, *Heffron* v. *Int'l Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981), but in the public "streets [and] sidewalks, [which] are considered, without more, to be 'public forums.'" *United States* v. *Grace*, 461 U.S. 171, 177 (1983). Its provisions are both content-discriminatory and viewpoint-discriminatory, both overinclusive and underinclusive, and both overbroad and vague. Moreover, it delegates the definition of some of the conduct it prohibits to the unconstrained discretion of the police.

A. The Statute Prohibits a Wide Range of Expression.

Although commonly spoken of as a law prohibiting hostile demonstrations within 500 feet of foreign embassies, section 22-1115 in fact prohibits a very much broader range of expressive conduct.

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[5] *See* 81 Cong. Rec. 8484-86; 3518-19; 8586-93 (1937) (Senate); 81 Cong. Rec. 8728; 8792 (1937); 83 Cong. Rec. 1575 (1938) (House).

Geographically, the statute applies "within 500 feet of any building or premises within the District of Columbia *used* or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, *or for other official purposes* . . ." (emphasis added). Both literally and as enforced by the respondents, the law applies to *any place* where foreign officials conduct their business, including office buildings housing trade delegations, tourism offices and airline ticket offices. It applies not only to premises owned or leased by foreign governments, but to United States Government property and to private property.[6]

Thus, when a foreign official was at Blair House, the law was enforced against a person demonstrating against him within 500 feet of that U.S. Government building. *Zaimi* v. *United States*, 476 F.2d 511 (D.C. Cir. 1973). More recently, when a foreign dignitary gave a speech at the National Press Club, the "500 foot rule" was enforced around that private building, and persons who held up signs critical of his government within the 500 foot perimeter were arrested.[7] Individuals picketing the Statler Hilton (now the Capital Hilton) hotel to protest the Gridiron Dinner's exclusion of women were arrested under section 22-1115 because the hotel was within 500 feet of the Soviet Embassy.[8] And an individual picketing on the sidewalk in front of the White House in protest against the Vietnam War was arrested under the statute because a foreign dignitary was

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[6] Five hundred feet is no small distance. If applied to demonstrations directed at this Court, such a rule would allow picketing no closer than in the parking lot of the Capitol Building, in front of the Hart Senate Office Building, in the driveway of the Library of Congress, or near the Museum of African Art on A Street, N.E. -- all locations where the activity would be invisible to the Court and where passersby would be likely to believe that the demonstration was directed at a different institution.

[7] *United States* v. *Brown, et al.*, Crim. Nos. M-14345-81 to M-14350-81 (D.C. Super. Ct. 1981).

[8] *See United States* v. *Travers*, Crim. No. 42935-69 at n.6 (D.C. Gen. Sess. April 2, 1970), *reprinted in* 118 Cong. Rec. 31033 (1972).

then staying at Blair House.[9] The United States defended these arrests in court as having been "compelled by the language of the statute."[10]

In practice, the statute's effects are often farcical, as, for example, when individuals protesting British policy are required to picket in front of the Brazilian Embassy, 500 feet down the street.[11]

Nor is picketing the only form of expressive conduct prohibited by the statute. No disparaging "flag, banner, placard or device" may be "display[ed]" within 500 feet of covered premises. Thus, a single individual standing on the sidewalk with a sign, or even wearing a tee-shirt with a critical message (perhaps the slogan "Solidarnösc" or a picture of Nelson Mandela) violates the law.

The character of the speech prohibited is not limited to words of vilification, akin to a restriction of obscenity or "fighting words." Rather, *any* form of words or symbols, however mild or well-mannered, falls within the statutory ban if it would bring any protected person or entity into public "odium" or "disrepute." It was

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9 *United States* v. *Flanagan*, Crim. No. 16283-69A (D.C. Gen. Sess. 1969), *noted in United States* v. *Travers*, *supra*.

10 *See United States* v. *Travers*, *supra*. Judge Harold Greene, then of the D.C. Court of General Sessions, opined that the statute should be enforced only against demonstrations "which have a direct relationship to [a foreign] nation['s] . . . views . . . personnel . . . or . . . policies." *Id.* But his opinion is not binding upon either the police or the other judges of that court (now the D.C. Superior Court). *See* 1B *Moore's Federal Practice* ¶ 0.402[1] at 67 (2d ed. 1982).

11 "I commute to work down Massachusetts Avenue, and a week or two ago, I saw a group of protestors picketing in front . . . of the Brazilian Embassy. And if I had not had to stop at a red light so that I could read their signs and learn that they were protesting the British presence in Northern Ireland, I would have thought that they were protesting something in Brazil, but in fact, the British Embassy is 500 feet up the street, and that is what they were trying to protest, where the British Ambassador and staff presumably had no idea they were there, because this demonstration did not make the evening news." *District of Columbia Appropriations for Fiscal Year 1986: Hearings on H.R. 3067 Before the Subcomm. on the District of Columbia of the Senate Comm. on Appropriations*, 99th Cong., 1st Sess. 48 (1985) (testimony of Arthur B. Spitzer).

the clearly stated intention of the drafter and sponsor of the legislation that *any* critical speech be made criminal.[12]

Nor is the speech banned by section 22-1115 limited to criticism of foreign governments, government officials, or government policies. The display of signs expressing disapproval of the "acts, views or purposes" of any foreign "party or organization" on "political, social, or economic" matters is prohibited, as is the derogation of "any officer" of a foreign "party or organization." Thus, a picketer at the Swiss Embassy with a sign critical of the International Red Cross would be subject to arrest under section 22-1115.

The "congregating" clause of the statute is equally broad, prohibiting three or more persons[13] from standing on the sidewalk within 500 feet of an embassy or other covered premises unless the

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12 Senator Key Pittman, Chairman of the Senate Foreign Relations Committee and sponsor of the legislation, gave examples of the conduct it would prohibit:

> They can inscribe on a banner and hold it right in front of the entrance of an embassy, "We believe that the Japanese are guilty of violating their treaties; we believe that the Japanese are without excuse in invading China and murdering innocent Chinese people."
>
> . . .
>
> That is their privilege, they say. I say they have not a right to any such privilege in front of an embassy . . . .
>
> . . .
>
> In some cases there has been no great assemblage. There were only five or six persons. They were not interfering with the traff of the street. They were not using any language at all, but they carried placards which were critical of the governments represented by the embassies. Back and forward they walked, all day long. *That is not illegal under any law of which I know. I am trying to have it made illegal*
>
> . . . .

81 Cong. Rec. 8589, 8592 (1937) (emphasis added).

13 The statute is apparently enforced with the understanding that three persons is the minimum number that can constitute a "congregation." However, no court has authoritatively construed the law in that manner. *See Zaimi* v. *United States*, 476 F.2d 511, 514 n.18 (D.C. Cir. 1973) ("We intimate no view on that aspect of the case").

police feel like allowing them to stay. The enforcement of this clause is equally energetic; in a number of pending cases the defendants were arrested simply for congregating on the public sidewalk near an embassy, without signs.[14]

The court of appeals suggested that these restrictions on speech were not constitutionally significant because "[f]oreign ambassadors . . . have no . . . obligation to be accessible to public attack" since they are not "members of the American political community." App. 23a, 34a. But it is the rights of speakers, not the obligations of listeners, with which the First Amendment is concerned. *See Minnesota State Board for Community Colleges* v. *Knight*, 465 U.S. 271, 275-76 & nn.3&4 (1984). As Justice Harlan explained: "The First Amendment serves not only the needs of the polity but also those of the human spirit -- a spirit that demands self-expression." *Procunier* v. *Martinez*, 416 U.S. 396, 427 (1974) (concurring opinion).[15]

In any event, "attack[ing]" ambassadors is not the only, or even necessarily the major, purpose of demonstrating near an embassy. Such demonstrations have shown themselves to be, in some circumstances, not only an unusually effective part of our domestic political process,[16] but also a uniquely effective means of

14 *See Strinko* v. *United States*, (D.C. Ct. App. No. 85-1330); *Lipkin, et al.* v. *United States*, (D.C. Ct. App. Nos. 86-190 to 86-198).

15 Commentators have also noted the "cathartic" function of speech in allowing people to vent their strong feelings in a non-destructive manner. *See* M. Nimmer, *Nimmer on Freedom of Speech* § 1.04 (1984).

16 *See The Prosecution of Demonstrators Outside the Soviet Embassy: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 27 (1986) (summary of testimony of Ambassador Richard T. Davies); *id.* at 4 (testimony of Rabbi David Oler).

influencing the conduct of foreign governments, both for American citizens[17] and others.[18]

B. The Statute is Both Content- and Viewpoint-Discriminatory

Both respondents and the United States conceded below that section 22-1115 is a content-based restriction on speech.[19] The court of appeals agreed. App. 35a-37a. It is even more accurate to say that the law is a *viewpoint* -based restriction, for speech on the *subject* of a foreign nation's policies or officials is not prohibited; only speech *critical* of those policies or officials is a criminal offense. As this Court reaffirmed earlier this Term, "above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"; "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Arkansas Writers' Project, Inc.* v. *Ragland*, 55 U.S.L.W. 4522, 4524 (U.S. April 22, 1987) (quoting *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972), and *Carey* v. *Brown*, 447 U.S. 455, 462-63 (1980)). Even in a non-public forum, where restrictions on speech need only be "reasonable" and need not be precisely tailored, this Court has made it clear that viewpoint-discriminatory regulations are intolerable. *Cornelius* v. *N.A.A.C.P. Legal Defense and Educational Fund, Inc.*, 105 S. Ct. 3439, 3454-55 (1985). *Amici* are not aware of any case upholding a viewpoint-discriminatory law in a public forum or as applied to persons entitled to full First Amendment rights.[20]

17 *See id.* at 2 (statement of Senator Grassley); *id.* at 11 (testimony of Mark A. Epstein, Executive Director, Union of Councils for Soviet Jews).

18 Citizens of other nations, while in this country, enjoy no lesser right to freedom of speech than United States citizens. *See Bridges* v. *California*, 314 U.S. 252, 280 (1941) (Frankfurter, J., dissenting, noting Bridges' non-citizenship).

19 Brief for Appellees at 4; Brief for *Amicus* United States at 16.

20 *Parker* v. *Levy*, 417 U.S. 733 (1974), upheld a viewpoint-discriminatory restriction on the speech of an active-duty member of the Armed Services. As the Court emphasized in *Parker*, 417 U.S. at 758-59,

The court of appeals suggested, although it did not hold, that section 22-1115 might not be a content-based law because it is "justified by reference to content-neutral values -- the need to adhere to principles of international law and to provide sufficient protection to foreign embassies." App. 38a-39a n.15. But even if principles of international law or security concerns justified section 22-1115 -- which they do not, *see* Parts II-B and II-C below -- those principles can hardly be called "content neutral" if they incorporate an untested presumption that speech on one side of an issue violates international law or creates a security concern, while speech on the other side of the issue does not. One could as well have concluded that the statute at issue in *Mosley* was content-neutral because it was "justified by reference to [the] content-neutral value" of protecting schools from violence, with that "neutral" principle incorporating the presumption that only non-labor picketing was likely to lead to violence. *But see Mosley*, 408 U.S. at 100-101 & n.7. In effect, the court of appeals' suggestion would give foreign governments an absolute right to a "heckler's veto" over speech with which they disagree. Nothing could be more foreign to our traditions. *See Terminiello* v. *Chicago*, 337 U.S. 1 (1949); *Gregory* v. *Chicago*, 394 U.S. 111 (1969).

C. The Statute is Both Overinclusive and Underinclusive

Section 22-1115 is not narrowly tailored to fit any of its asserted purposes. To the extent that it is concerned with protecting the security of diplomats and embassies, it is overinclusive in outlawing conduct, such as a silent vigil by a solitary sign-holder, that presents no colorable threat to security. Simultaneously, however, it is underinclusive in failing to address truly threatening conduct, such as the presence of a single person without a sign, but with a gun or a slingshot or a basket full of rotten eggs and tomatos, in front of the embassy. Indeed, for the reasons explained in Part II-B below, section 22-1115 does not serve the purpose of security in any comprehensible way at all.

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and has since reiterated, the First Amendment rights of soldiers are not governed by the same standards as the rights of civilians. *See, e.g., Goldman* v. *Weinberger*, 106 S. Ct. 1310 (1985); *Rostker* v. *Goldberg*, 453 U.S. 57 (1981).

To the extent that the statute is concerned with protecting diplomats from harassment and insult, it is overinclusive in prohibiting wholly peaceful and polite expressions of disagreement written on signs or banners, and even signless congregations, within 500 feet of covered premises. Simultaneously, however, it is irrationally underinclusive in permitting individuals to shout epithets and invective at high volume while standing as close to the embassy as they please. *Zaimi* v. *United States*, 476 F.2d 511 (D.C. Cir. 1973).[21] It also fails to address a wide variety of other speech that is far more likely than picketing to give offense to a foreign government: critical newspaper editorials, xenophobic public speeches by U.S. government officials and candidates for public office, television newscasts showing foreign government police or troops beating peaceful demonstrators in their capital cities, and the like. Of course such newspaper editorials, public speeches and news broadcasts cannot be prohibited under the First Amendment. But such expressive activities are no more protected by that amendment than the activity of standing peacefully on the public sidewalk holding a sign. It makes no sense at all to permit such speech while banning the speech criminalized by section 22-1115.

D. The Statute is Impermissibly Vague.

"[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) (Holmes, J.).

The line drawn by section 22-1115 is far from clear, and its warning to the world thus far from fair. The law makes it criminal to display a sign that will bring certain persons or entities "into public odium." But how much ill-will is necessary to constitute

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21 In so construing the statute, the D.C. Circuit was acting in its former capacity as the highest court of the District of Columbia. Accordingly, its construction of the statute is authoritative. *See M.A.P.* v. *Ryan*, 285 A.2d 310, 312 (D.C. App. 1971).

"odium"?[22] How widespread must it be to be "public"? If 95% of the public *already* believes that the person or entity is odious, can the activities addressed by the statute still "bring" him or it "into" public odium?[23]

Similarly, it is unlawful to "bring into public disrepute" the "views . . . or purposes" of "any foreign . . . organization." Are private organizations included, or is the term limited to governmental or political organizations? And how and by whom are the "purposes" of a government, party or organization to be determined?

If, as here, "[persons] of common intelligence" who wish to conform their conduct to the law "must necessarily guess at [the] meaning and differ as to [the] application" of these terms, then the law is unconstitutionally vague. *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926); *see Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983).

Such vagueness typically leads to the unnecessary chilling of free speech rights and to arbitrary and discriminatory enforcement. *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972). Those have been precisely its effects here.[24] It is to prevent such abridgment of First Amendment rights that the vagueness doctrine is applied with special vigilance in the First Amendment area. *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974). Section 22-1115 cannot survive that exacting scrutiny.

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22 Black's Law Dictionary (rev. 4th ed. 1968) says the term "means hatred and dislike." *Id.* at 1232. But those two terms are hardly synonymous. Which does the statute mean?

23 *Cf. Cardillo* v. *Doubleday & Co., Inc.*, 518 F.2d 638 (2d Cir. 1975) (dismissing libel suit on grounds that the disreputable plaintiff was "libel-proof").

24 *See* Pub. L. No. 99-399, § 1302, 100 Stat. 897 (1986) ("It is the sense of Congress that [§ 22-1115] . . . may have been selectively enforced, and peaceful demonstrators may have been unfairly arrested under that law"); *see also* App. 53a (ordering remand for consideration of "allegations of incidents in which police officers, claiming to be enforcing section 22-1115, prevented some of the appellants from engaging in activity which section 22-1115 plainly does not proscribe").

E. The Statute Vests Excessive Discretion in the Police.

The second clause of section 22-1115 makes it a crime to "congregate within 500 feet of [any covered premises] and refuse to disperse after having been ordered so to do by the police authorities." But nothing in the statute gives the police any guidance about when to issue such an order.

The court of appeals thought to save the statute from this infirmity by reading into it a rule that "the authority [to disperse] may be exercised . . . only when the police reasonably believe that a threat to the security or peace of the embassy is present." App. 43a. But the majority rejected the possibility that such circumstances could be defined by reference to the language of the statute itself, *i.e.*, that a congregation could be ordered to disperse only if it was engaging in activity proscribed by the first clause of the statute. App. 43a-44a n.17. Rather, according to the majority, the police must exercise their authority with reference to "the general purposes which motivated the enactment of the statute as a whole." *Id.*

But such vague, indeed circular, "guidance" cabins police discretion no more than the statute does on its face. If "the general purposes which motivated the enactment of the statute as a whole" can provide an adequate guide for discretionary enforcement, then the statutes at issue in such cases as *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969), and *Saia* v. *New York*, 334 U.S. 558 (1948) should have been upheld, since the "general purposes which motivated the[ir] enactment" were more easily capable of ascertainment than that of this law.[25] This is not the "narrow, objective, and definite standard[]" required of a law governing First Amendment activities. *Shuttlesworth, supra*, 394 U.S. at 151.

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25 The purpose of the Birmingham ordinance was set out in its text: to protect "the public welfare, peace, safety, health, decency, good order, morals or convenience." 394 U.S. at 149. So, too, was the purpose of the Lockport, New York ordinance, which restricted the use of loudspeaker equipment "to [prevent] the annoyance or inconvenience of travelers upon any street or public places or of persons in neighboring premises." 334 U.S. at 558 n.1. As to the actual motivation behind § 22-1115, *see* p. 21, *infra*.

To illustrate with a very relevant example, does or does not the peaceful presence of a stationary group of people near an embassy, without signs, present a situation intended to be prohibited by "the general purposes which motivated the enactment of [section 22-1115] as a whole"? Neither a lawyer, nor even a person of common intelligence, can tell. Yet such conduct in fact makes one liable to arrest and prosecution in the District of Columbia. *See* note 14, *supra*.

II. SECTION 22-1115 IS NOT SUPPORTED BY ANY COMPELLING INTEREST.

Because section 22-1115 is not content neutral, it cannot be sustained under the relatively lenient standard of review applied to regulations of the time, place and manner of speech. *Regan* v. *Time, Inc.*, 468 U.S. 641, 648 (1984). The District of Columbia thus "faces a heavy burden in attempting to defend its content-based [and viewpoint-based] approach" to regulating speech; "[i]n order to justify [section 22-1115 it] must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project, supra*, 55 U.S.L.W. at 2524. Two allegedly compelling interests have been asserted in support of the statute: adherence to the Law of Nations, and the provision of adequate security to embassies and diplomats. We show below that neither interest provides compelling support *for this statute*, and that the statute's tailoring fits these interests more like a potato sack than like the required designer suit.

A. Congress has Determined that the Statute is of Questionable Constitutionality and is Not Necessary to Serve any Significant National Interest.

Section 22-1115 is a local law. Although enacted by Congress, it is codified only in the District of Columbia Code, may be enforced only in the District of Columbia Superior Court, *see* D.C. Code § 22-1116, and may be amended or repealed by the District of Columbia Council.[26] The United States has implicitly

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26 A repeal of § 22-1115, like any other non-emergency legislation passed by the D.C. Council, would lie before Congress for 30 days before becoming effective, *see* D.C. Code § 1-233(c)(1), but could be overturned only in the same way that Congress could overturn any State's legislation -- by affirmative legislation passed by both Houses and signed by the President. D.C. Code § 1-233(c)(2). By contrast, when Congress has perceived a continuing federal interest in local District of Columbia laws, it has known how to protect that interest. *See* D.C. Code § 1-233(a) (D.C. Council prohibited from amending Title 11 of the D.C. Code; from permitting buildings to exceed the height limitation in effect as of December 24, 1973; from imposing any tax on the income of non-residents; etc.).

recognized the non-federal character of section 22-1115 by appearing as an *amicus* below and in this Court, rather than as an intervenor, as would have been its statutory right if the constitutionality of a law of the United States were at issue. *See* 28 U.S.C. § 2403(a).

Whatever may have been the case in 1938, Congress has now effectively renounced any imperative federal interest in this law. Last year, in connection with other legislation in the same field, the Senate passed legislation repealing section 22-1115.[27] In the conference committee, objections were raised on the ground that it was inappropriate for Congress to amend purely local provisions of the District of Columbia Code, and thus "this section of the act violated the tenants [*sic*] of Home Rule" for the District of Columbia. 132 Cong. Rec. S.11427 (daily ed. Aug. 12, 1986); *see also id.* at S.8473 (daily ed. June 25, 1986). Accordingly, the conference committee agreed to replace the repealer with the following language, which was enacted by both Houses of Congress and duly signed into law by the President:

> It is the sense of Congress that--
>
> (1) the District of Columbia law concerning demonstrations near foreign missions in the District of Columbia (D.C. Code, sec. 22-1115) *may be inconsistent with the reasonable exercise of the rights of free speech and assembly*, that law may have been selectively enforced, and peaceful demonstrators may

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27 *See* 132 Cong. Rec. S.8414 (daily ed. June 25, 1986) (repealer adopted as amendment to H.R. 4151 (the "Omnibus Diplomatic Security and Anti-Terrorism Act of 1986")); *id.* at S.8473 (daily ed. June 25, 1986) (passage of bill as so amended).

have been unfairly arrested under that law;

(2) the obligation of the United States to provide adequate security for the missions and personnel of foreign governments *must be balanced with the reasonable exercise of the rights of free speech and assembly;* and

(3) therefore, the Council of the District of Columbia *should review and, if appropriate, make revisions* in the laws of the District of Columbia concerning demonstrations near foreign missions, in consultation with the Secretary of State and the Secretary of the Treasury.

Pub. L. No. 99-399, § 1302, 100 Stat. 853, 897 (Aug. 27, 1986) (emphasis added).

Congress has thus explicitly disavowed any prior judgment that section 22-1115 is either necessary or constitutional. Moreover, it has expressly disclaimed any overriding federal interest in the continued existence of this law, indicating its willingness -- eagerness might be more accurate -- that it be repealed by the District of Columbia Council.[28]

The action of the 99th Congress is "highly relevant in assessing the constitutional validity of" section 22-1115. *Rostker* v. *Goldberg*, 453 U.S. 57, 75 (1981). As in that case, although "Congress did not [repeal the statute], it did thoroughly reconsider the question." *Id.* As in *Rostker*, it is Congress' *current* assessment of the constitutional balance that is entitled to "the customary deference." *Id.* at 64. For the same reasons that subsequent legislation on the same subject is entitled to great weight in construing earlier enactments, *see Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 380-81 (1969); *Alexander* v. *Alexandria*, 5 Cranch 1, 7 (1809), it is entitled to great weight in assessing the strength of the governmental interest underlying a statute, which

28 A bill to amend § 22-1115 so as to make it parallel to the provisions of 18 U.S.C. § 112(b) is pending before the D.C. Council. *See* Bill No. 7-59, the "Protection of Foreign Officials, Official Guests, and Internationally Protected Persons Amendment Act of 1987" (introduced Jan. 20, 1987).

must be judged as of today, not as of 1938.

In these circumstances, the court of appeals' conclusion that section 22-1115 is supported by compelling interests of the United States Government was plainly mistaken.[29] Thus, the only question presented is whether there is a compelling interest of the District of Columbia, not of the United States, sufficient to sustain the statute.

B. Considerations of Safety and Security Do Not Sustain the Statute.

1. In the lower courts, both the respondents and *amicus* United States identified the need to protect foreign diplomats in the United States -- and reciprocally, American diplomats abroad -- from harm as the primary interest supporting section 22-1115. A sufficient answer to this contention is that the protection of diplomats is obviously a *national* interest, not an interest of the District of Columbia. Congress having formally eschewed such an interest in the continued existence of *this statute*, it is not for the courts to manufacture such an interest.[30]

2. Even assuming that the District of Columbia can appropriately assert this interest, the court of appeals correctly perceived that the statute cannot be sustained on this ground, for its broad sweep "bears *no* relation to safeguarding the physical security of the building and its occupants. . . . The only *conceivable* interest that would support such a restriction of speech is that of dignity and peace." App. 33a (emphasis added).

The affidavits of security officials submitted to the district court provide no support for the validity of *this statute*. It may be

29 The judgment of the court of appeals was entered on August 19, 1986, seven days after Congressional passage of the Omnibus Diplomatic Security and Anti-Terrorism Act, and eight days before it was signed by the President. The court of appeals was apparently unaware of the legislation. No petition for rehearing was filed.

30 Of course the District of Columbia has a strong interest in protecting the safety of all persons within its borders, including foreign diplomats and dignitaries. And it is quite reasonable for the District to put greater resources into the protection of persons who, for whatever reason, may be more likely targets of harm than the average person. But the District has no *special* interest in protecting diplomats *qua* diplomats.

true that the inability of the police to set up defenses or a command post on the grounds of a foreign embassy would justify a somewhat larger "buffer zone" between an embassy and a large, hostile crowd than is necessary around a U.S. government building. But section 22-1115 does not apply only to embassies; it provides the same "buffer zone" around places such as Blair House, hotels where foreign diplomats make speeches, and office buildings housing foreign government offices -- places where the police are not disabled from operating inside the building.

On those relatively rare occasions when the need for a "buffer zone" actually exists, it can be fully served by implementation of the D.C. Police Line Regulation, which empowers the police to "establish such area or zone as . . . necessary for the purpose of affording a clearing for . . . [t]he protection of persons or property." D.C. Police Regs. Art. 6, § 2(a) (1981). Persons who enter such a zone are subject to arrest, as are persons who violate existing District of Columbia laws prohibiting unlawful assembly, D.C. Code § 22-1107; disorderly conduct, D.C. Code § 22-1121; and unlawful entry on property, D.C. Code § 22-3102. As the Department of Justice and the Secret Service have conceded, similar local ordinances provide adequate protection for diplomatic premises elsewhere in the United States, and indeed are the *preferred* law-enforcement tools for dealing with embassy demonstrations.[31]

To the extent that local laws are not enough, 18 U.S.C. § 112(b) is also available. That section makes it a federal crime to intimidate, threaten, harass or obstruct a foreign official, or to attempt to do so, or to congregate with two or more other persons within 100 feet of any diplomatic premises with the intent of committing any such acts. As enacted in 1972 and amended in 1976, that statute provides all the protection Congress and the President thought necessary to protect diplomats elsewhere in the country -- including ambassadors when they travel outside the District of

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31 *See District of Columbia Appropriations for Fiscal Year 1986: Hearings on H.R. 3067 Before the Subcomm. on the District of Columbia of the Senate Comm. on Appropriations*, 99th Cong., 1st Sess. 68 (1985) (testimony of John C. Keeney, Deputy Assistant Attorney General); *id.* at 77 (testimony of Thomas D. Quinn, Acting Deputy Assistant Director, Uniformed Division, U.S. Secret Service).

Columbia.[32]

Even if these other laws did not exist, however, no concern for the safety of diplomats or the security of their buildings could justify section 22-1115, which simply is not directed at conduct that poses any such dangers. A statute making it unlawful "to publish newspapers or throw hand grenades in the District of Columbia" would no doubt contribute to public safety. But because there is no necessary connection between the two prohibited activities, such a law could not be upheld as "narrowly tailored" to any safety rationale. The fault with section 22-1115 is the same -- it prohibits both riotous mobs and solitary picketers within 500 feet of covered premises. As the court of appeals recognized, it is nothing less than absurd to suggest that the police need a 500 foot "buffer zone" to protect the safety of an embassy against the threat posed by the presence of a single person holding a sign, or by a group of three or four persons holding a press conference on the sidewalk. App. 33a. The connection between those activities and activities that pose a danger to safety is as illusory -- and as unsupported in this record -- as the connection between publishing a newspaper and throwing a hand grenade.

3. From a security point of view, section 22-1115 is even more fatally flawed, for it rests upon a presumption that persons peacefully exercising traditional First Amendment rights present a significant danger to safety and security, while other persons, present at the same time and place, present no such threat. Such a presumption is empirically untenable and constitutionally disgraceful.

Terrorists and others bent upon doing harm generally do not advertise their intentions to their victims or to the police. The driver of the explosives-laden truck that crashed into the U.S. Marine barracks in Beirut did not first display his sentiments by driving past the gate with an anti-American sign. John Hinkley did not stand by

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32 If additional authority, beyond that already available under other provisions of D.C. and federal law, is needed to deal with situations involving large crowds -- and we do not believe that any such need exists -- such authority could be enacted. *Cf.* U.S. Capitol Police Regulations, §§ 156, 159 (1976) (special conditions apply to demonstrations of more than 300 people); 36 C.F.R. § 50.19(b)(1) (National Park Service regulations requiring permits for demonstrations only of 25 or more persons).

the door of the Washington Hilton Hotel with a hostile sign. Lee Harvey Oswald did not display a hostile sign. Nor did Sirhan Sirhan, James Earl Ray, Arthur Bremer, Charles Guiteau or John Wilkes Booth. The Hanafi Muslims who took over the District Building and the B'nai B'rith Building in 1977 did not precede their violence with a peaceful picket line in front of those buildings. It would be irrational for the police and the Secret Service to focus their protective vigilance against peaceful demonstrators to the exclusion of others, and we are confident that they do not do so.

But that is precisely the irrationality of section 22-1115, from a security point of view. It requires the police to keep the solitary, peaceful picketer with a critical sign 500 feet from the embassy gate, while providing them with no authority to stop the picketer with an approbatory sign (but who may have a hand grenade in his pocket), or the two furtive-looking men with their hats over their eyes and their hands in the pockets of their overcoats -- but no signs -- from walking right up to the embassy door. Not that the latter conduct should necessarily be prohibited; but if it is not, surely prohibiting the former cannot be regarded as a rational effort to protect the security of the embassy or its occupants.

If the danger to a particular embassy is acute, the only rational response is to keep *all persons* not having official business away from the site, not just demonstrators. The police authorities know this, for it is their standard practice when providing protection to important foreign dignitaries.[33] And if we are concerned about the reciprocal protection of American diplomats abroad, surely what we want foreign governments to provide is a security zone that keeps *all persons* at a safe distance from our facilities, not just people holding critical signs.

Section 22-1115 thus adds nothing to the protection of security except the convenience of not having to make case-by-case judgments about when an individual or a group presents a threat of impending danger. But, as this Court has already held,"[p]redictions about imminent disruption from picketing involve judgments

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[33] *Cf.* 36 C.F.R. § 50.19(e)(10) (National Park Service regulation prohibiting *all persons* from bringing dangerous objects near the White House).

appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter." *Mosley, supra,* 408 U.S. at 100-101.

If the government can restrict peaceful speech or assembly based on a presumption that people who speak or assemble are inherently more dangerous than those who do not, then it can restrict *all* speech. If the government can restrict peaceful "hostile" picketing based on a presumption that picketers whose point of view is antagonistic to the target of the picketing are inherently more dangerous than non-"hostile" picketers, then it can ban 95% of *all* picketing. Legitimation of such a rationale would open the door to widespread content- and viewpoint-based censorship. It should be rejected out of hand.

4. The immediate impetus behind the enactment of section 22-1115, as its sponsor made plain, was concern for the safety of U.S. citizens abroad, who, it was feared, might be subjected to violent attack by foreign mobs whipped into a frenzy by their knowledge that their nation's embassy in Washington was being picketed. *See* 81 Cong. Rec. 8484-85, 8487, 8490 (1937). Putting aside the inherent improbability of that scenario, the acceptance of such a legislative purpose as the basis of a permanent limitation on political speech in this country raises frightening apparitions: if a foreign terrorist group threatens harm to Americans abroad unless speech in this country hostile to their cause is prohibited, can Congress constitutionally enact such a ban? We hope the negative answer to that question is no more obvious than its applicability to this case. Of course, any retaliation against U.S. citizens abroad because of the expression of views by their countrymen at home would be most unfortunate, but surely recent events have taught us that concern for the fate of Americans abroad is not a sufficient basis for disregarding basic constitutional principles at home.

C. The Interest in Adhering to International Law Does Not Sustain the Statute

Having properly rejected respondents' argument that section 22-1115 could be sustained as a public safety or diplomatic security measure, the court of appeals upheld the law on a ground of its own devising: that the statute served "the interest in maintaining our

nation's adherence to longstanding principles of international law." App. 27a.

Again, a sufficient answer to this contention is that Congress has now determined that section 22-1115 does *not* serve any such interest. Nor may this distinctively national interest properly be asserted by the District of Columbia as a local government.[34] Even if this interest is properly before the Court, however, it does not save the statute, because the court of appeals' *sua sponte* dissertation on the rules of international law was simply incorrect.[35]

1. The Founders Did Not Believe that the Law of Nations Required Any Restrictions on Speech.

The court of appeals thought it "clear beyond quibble that since the founding of our nation adherence to the law of nations . . . has been regarded as a fundamental . . . national interest." App. 16a. This being so, it certainly would have been odd if Congress had failed to exercise its power to fulfill its obligations under the law of nations until 1938.

Congress was not so negligent. In fact, the First Congress promptly turned its attention to the matter, providing:

> That if any person . . . shall assault, strike, wound, imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister, such persons so offending, on conviction, shall be imprisoned not exceeding three years, and fined at the discretion of the court.

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34 *See* The Federalist No. 42, at 265 (C. Rossiter ed. 1961) ("These articles [of Confederation] contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations. . . . For the sake of certainly and uniformity, therefore, [granting Congress] the power of defining felonies in this case was in every respect necessary and proper").

35 *Cf. Carducci* v. *Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research") (per Scalia, J.).

Act of April 30, 1790, § 28, 1 Stat. 112, 118 .

Such legislation, "'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument,' . . . sheds light . . . on what the draftsmen [understood the Law of Nations] to mean." *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983), *quoting Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888). The court of appeals' view that Congress was virtually compelled to enact section 22-1115 in order to comply with basic tenets of international law that have been in effect "for as long as the United States has been a nation," App. 9a, cannot be reconciled with the rather different views of the 1st through 75th Congresses.

2. The Vienna Convention Does Not Support the Statute.

The 1961 Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, T.I.A.S. No. 7502, to which the United States is a signatory, was adopted as a "comprehensive formulation of diplomatic law," covering "every point on which a legal rule existed" in the field. E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 3 (1976). As the court of appeals noted, the relevant Article of that Convention is Art. 22, which provides that a nation has a "special duty" to protect a foreign mission against "disturbance of the peace" or "impairment of its dignity." App. 14a; 23 U.S.T. at 3237.

The court of appeals was mistaken, however, in assuming that this "special duty" encompassed any obligation to prohibit peaceful picketing or assembly near an embassy. Rather, as the legislative history of Art. 22 makes clear, the "special duty" is a duty to exercise special *vigilance* in order to protect diplomats and diplomatic premises from harm.

The "special duty" language was inserted into Art. 22 (then Art. 12) of the draft Convention on the motion of the British delegate to the International Law Commission, Sir Gerald Fitzmaurice, whose nation did not then and does not now have any law comparable to section 22-1115 (*see* Part 3, *infra*). In the ensuing discussion, delegates from three nations noted their agreement with the proposition that a nation should be obligated to exercise "special

vigilance" or take "more elaborate precautions" to protect diplomats than to protect private citizens. No suggestion was made that the language implied any broadening of the substantive harms from which diplomats were entitled to be protected.[36]

We have found no specific discussion of the meaning of the words "peace" or "dignity" in the legislative history of the Convention, but the exhaustive study of existing international diplomatic law prepared by the United Nations Secretariat preparatory to the drafting of the Vienna Convention contains no hint of any consensus, or even minority view, that peaceful demonstrations were not permitted near embassies.[37] *Diplomatic Intercourse and Immunities* , II *Yearbook of the Int'l Law Comm'n 1956* at 129-172, U.N. Doc. A/CN.4/98.

After the United States became a party to the Convention, Congress enacted legislation explicitly intended to fulfill our obligations thereunder. That legislation, codified in part at 18 U.S.C. § 112, shows that in Congress' view the protection of First Amendment values is not inconsistent with our obligations under international law. Indeed, if the court of appeals is right that the Law of Nations requires the enforcement of section 22-1115, then Congress has put the United States in violation of that Law everywhere but in the District of Columbia.[38]

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36 *See Minutes of 396th Meeting of the International Law Commission (Diplomatic Intercourse and Immunities)*, I *Yearbook of the Int'l Law Comm'n 1957* at 63, U.N. Doc. A/CN.4/91.

37 Nor, apparently, did other nations have such a law when § 22-1115 was adopted. *See* 81 Cong. Rec. 8592 (1937) (remarks of Senator La Follette).

38 The court of appeals hypothesized several reasons why Congress may have left § 22-1115 on the books when it enacted 18 U.S.C. § 112. App. 24a-25a n.9. Nothing in the record or in the legislative history supports those speculations. To the contrary, the record shows that Congress was simply misinformed that "a District law of long standing affords *similar* protection to foreign officials in the Nation's Capital." S. Rep. No. 92-1105, *reprinted in 1972 U.S. Code Cong. & Admin. News* 4316, 4328 (emphasis added). On the floor, the bill's manager described § 22-1115 as establishing "a harassment perimeter." 118 Cong. Rec. 31035

3. The British Government Has Concluded that a Law Like Section 22-1115 Would be Improper.

Recent parliamentary and judicial actions in Great Britain lend strong support to the conclusion that neither general principles of international law nor Article 22 of the Vienna Convention require anything resembling section 22-1115. Both before and after the adoption of the Vienna Convention, demonstrations near embassies in London have been permitted,[39] and are governed by the same laws generally governing parades and demonstrations there.[40]

In the wake of the 1984 shooting incident at the Libyan Embassy in London, the British government conducted an extensive inquiry into the need for additional restrictions on demonstrations near embassies. In testimony before the Foreign Affairs Committee of the House of Commons, Sir Antony Ackland, Permanent Under Secretary of State and Head of the Diplomatic Service, was asked to state his views on the government's obligations under Article 22 of the Vienna Convention. He replied:

> I think the essential thing is that demonstrations should be adequately controlled and policed so that there is no damage done physically or otherwise to the premises of the mission or to the people within that mission. . . . [P]rovided the mission is kept secure

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(1972) (remarks of Senator McClellan). *See also* 132 Cong. Rec. S.6479 (daily ed. June 2, 1986) (remarks of Sen. Grassley).

39 "There are some 350 demonstrations a year outside embassies in London." *Diplomatic Immunities and Privileges: Government Report on Review of the Vienna Convention on Diplomatic Relations*, Cmnd. 9497, at 17 (1985).

40 *See* Public Order Act 1936, 1 Edw. 8 & 1 Geo. 6, ch. 6. That statute specifically provided that "no conditions restricting the display of flags, banners, or emblems shall be imposed . . . except as are reasonably necessary to prevent risk of a breach of the peace." *Id.* at § 4-8243(1). The Metropolitan Police Act 1839, 2 & 3 Vict., ch. 47, which provides additional police authority over demonstrations in London, also contains no special provisions dealing with embassies. Recent legislation in this area likewise makes no distinction between embassies and other places. *See* note 43, *infra*.

> from physical attack and inmates secure from physical molestation, that probably fulfills the duty of the receiving state.

Diplomatic Immunities and Privileges: Minutes of Evidence taken before the Foreign Affairs Committee 21-22 (June 20, 1984). Similarly, Sir Francis Vallat, head of the United Kingdom delegation to the Vienna Conference and a member of the drafting committee that drew up the 1961 Vienna Convention,[41] was asked: "Can you confirm that there is nothing in the Vienna Convention which explicitly forbids powerful demonstrations in the immediate vicinity of an embassy[?]" He replied: "There is nothing, Mr. Chairman." *Id.* at 38 (July 2, 1984).

In December, 1984, the Foreign Affairs Committee issued its report and recommendations:

> Our view is that although the "peace of the mission" may not be entirely identical to the Queen's peace, **the receiving state's duty to protect the peace of the mission cannot be given so wide an interpretation as to require the mission to be insulated from expressions of public opinion within the receiving state. Provided always that work at the mission can continue normally, that there is untrammelled access and egress, and that those within the mission are never in fear that the mission might be damaged or the staff injured, the requirements of Article 22 are met.**

The Abuse of Diplomatic Immunities and Privileges: the First Report from the Foreign Affairs Committee in the Session 1984-85 at xvii-xviii (1984) (boldface in original).[42]

Her Majesty's Government then studied the matter and

41 Sir Francis was also Legal Advisor to the British Foreign Office from 1960 to 1968 and a member of the United Nations International Law Commission from 1973 to 1981. *Id.* at 32.

42 The Foreign Affairs Committee specifically noted its awareness, and thus its rejection, of D.C. Code § 22-1115. *See id.* at xvii n.65.

issued a formal reply to the Parliamentary report:

> [W]e have also considered whether new measures are required to prevent demonstrations disrupting the peace of diplomatic missions or impairment of their dignity (as required under Article 22), or becoming so provocative as to lead to violent incidents. *The Government fully share the Committee's view that the UK's duty to protect the peace of diplomatic missions cannot be interpreted so widely that no demonstrations are allowed outside them.* The government also agree with the Committee that the essential requirements are that the work of the mission should not be disrupted, that the mission staff are not put in fear, and that there is free access for both staff and visitors.

Diplomatic Immunities and Privileges: Government Report on Review of the Vienna Convention on Diplomatic Relations, Cmnd. 9497, at 17 (1985) (emphasis added; cross-reference omitted).[43]

The British courts have taken the same view. Ruling in a test case brought against a demonstrator arrested near the South African Embassy in Trafalgar Square, the Chief Metropolitan Stipendiary Magistrate ordered the charges dismissed, despite the prosecution's reliance on Article 22 of the Vienna Convention. *Regina* v. *Roques* (Bow Street Magistrate's Court, Aug. 1, 1984). *See The Times* (London), Aug. 2, 1984, at 2 col. 2; *The Abuse of Diplomatic Immunities and Privileges: the First Report from the Foreign Affairs Committee in the Session 1984-85* at xvii (1984).

43 Parliament last November enacted an omnibus law covering offenses against the public order. While providing certain new police powers over parades and demonstrations generally, it contains no special provisions relating to demonstrations near foreign embassies. *See* Public Order Act 1986, ch. 64 (effective April 1, 1987). That option was considered and rejected. *See Review of Public Order Law,* Cmnd 9510, at 34-35 (1985).

4. Even if Section 22-1115 Were Supported by International Law, it Would be Unconstitutional.

We have shown above that section 22-1115 is not required by international law. But even if it were, that would not save this egregious statute, for "[t]he restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations." *Perez* v. *Brownell*, 356 U.S. 44, 58 (1958). Thus, Congress' power under the tenth Clause of Art. 1, § 8, "To define and punish . . . Offenses against the Law of Nations" is no more immune from the limitations on government action imposed by the First Amendment than is its power under Clause 1 of that Article "To lay and collect taxes," *see Flast* v. *Cohen*, 392 U.S. 83 (1968); its power under Clause 7 "To establish Post Offices," *see Lamont* v. *Postmaster General*, 381 U.S. 301 (1965); its power under Clause 14 "To make Rules for the Government and Regulation of the land and naval Forces," *see Schacht* v. *United States*, 398 U.S. 58 (1970); or its power under Clause 17 "To exercise exclusive Legislation in all Cases whatsoever, over [the] District [of Columbia]," *see Chief of Capitol Police* v. *Jeanette Rankin Brigade*, 409 U.S. 972 (1972). As the Court emphasized nearly a century ago:

> The treaty power, as expressed in the constitution, is in terms unlimited, except by those restraints which are found in that instrument against the action of the government . . . . *It would not be contended that it extends so far as to authorize what the constitution forbids.*

De Geofroy v. *Riggs*, 133 U.S. 258, 260 (1890); *accord Reid* v. *Covert*, 354 U-.S. 1, 16 (1957). Even if the diplomats of other nations did desire to be shielded from unfriendly words -- a desire not even hinted at in this record -- that is not a favor in the power of the United States government to grant, consistent with the Constitution.

D. No Legitimate Interest Supports the Exemption for Labor Picketing.

Even if the interests discussed above were otherwise sufficient to sustain section 22-1115, the statute must fall under the exact analysis of *Police Dept. of Chicago* v. *Mosley* and *Carey* v. *Brown, supra*. For, precisely as in those cases, section 22-1115 contains a proviso (codified as D.C. Code § 22-1116) exempting labor picketing from its prohibitions. As in *Mosley* and *Carey*, the existence of that exception hangs from the statute like a third sleeve from a suit jacket -- wholly contradicting any possible claim of attentive tailoring.

Whether the underlying interest served by section 22-1115 is the protection of diplomats' physical safety or even their insulation from insult, it is irrational to presume that labor picketing will impinge less on those interests than any of the other activities prohibited by the statute, such as a silent congregation of three people without signs or a single person standing on the sidewalk with a sign.[44] In *Mosley* the Court rejected the identical presumption, noting that "[f]reedom of expression would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis." 408 U.S. at 101.

Contrary to the court of appeals' intimation, App. 48a n.20, the statute cannot be saved from this infirmity by striking the labor exemption. That would make labor picketing a crime despite Congress' affirmative refusal, 81 Cong. Rec. 8593 (1937), to criminalize it. Even the most vigorous advocates of "judicial activism" have never suggested that judges have the power to define new criminal offenses. To the contrary, "the plain principle [is] that

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[44] To support such a presumption, the District of Columbia would have to demonstrate that it had a more compelling interest in protecting a diplomat from seeing a single person standing 450 feet from the embassy gate with a sign reading "PLEASE, AMBASSADOR JONES, ASK YOUR GOVERNMENT TO RECONSIDER ITS TARIFF POLICY" than in protecting her from seeing a picket line immediately in front of the gate carrying signs reading "AMBASSADOR JONES EXPLOITS LABOR," and "GOVERNMENT OF EREHWON UNFAIR TO WORKERS."

the power of punishment is vested in the legislative, not in the judicial department." *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820) (Marshall, C.J.). As in *Mosley* and *Carey*, the proper remedy for this statutory violation of the First Amendment and of the equal protection component of the Fifth Amendment is to hold the entire enactment unconstitutional.

CONCLUSION

For the reasons given above and in the brief of the petitioners, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 86-803

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

MICHAEL BOOS, *et al.*,
Petitioners,

v.

MARION BARRY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF GERALDINE M. LIPKIN, YOSEF I. ABRAMOWITZ, SERGEY V. BROUDE, JUNE E. DANIELS, KONNILYN G. FEIG, NANCY E. FRANK, WILLIAM QUENTIN GRAHAM, IRA I. KORINOW, AND DOROTHY MAHLIN

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TABLE OF CONTENTS

PAGE

Interest of the Amici.....2

STATEMENT OF FACTS.....5

A. Amici's Trial.....5

B. Prior Interpretations of the Congregation Clause.....8

ARGUMENT 14

A. Although Judge Bork's Construction Is Correct, Abstention May Be Appropriate In This Case.....14

B On the Merits, The Interpretation Propounded Below Should Be Affirmed.....21

CONCLUSION.....31

TABLE OF AUTHORITIES

CASES — PAGE(S)

Carey v. Brown, 447 U.S. 455 (1980).....32

CISPES v. FBI, 770 F.2d 468 (5th Cir. 1985).....22, 23

City Council, v. Taxpayers for Vincent, 466 U.S. 789 (1984).....28-29

Clark v. Community for Creative Nonviolence, 468 U.S. at 293.....25, 28

Coates v. Cincinnati, 402 U.S. 611 (1971).....31

Cox v. Louisiana, 379 U.S. 536 (1965).....15

DeJonge v. Oregon, 299 U.S. 255 (1937).....26-27

Edwards v. South Carolina, 372 U.S. 229 (1963).....28

Finzer v. Barry, 798 F.2d 1450 (D.C. Cir. 1986).....passim

Hall v. C&P Telephone Co., 793 F.2d 1354 (D.C. Cir. 1986).....19

Harris County Comm'n Court v. Moore, 420 U.S. 77 (1975).....20, 21

Justice v. Superior Court, District of Columbia, 732 F.2d 949 (D.C. Cir. 1984).....18-19

Kinoy v. District of Columbia, 400 F.2d 761, 769 (D.C. Cir. 1968).....3

Pernell v. Southall Realty, 416 U.S. 363 (1974).....20

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972).....32

Railraod Comm'n v. Pullman Co., 312 U.S. 496 (1941).....19

Schact v. United States, 398 U.S. 58 (1970).....24

Shuttlesworth v. Birmingham, 394 U.S. 147 (1969).....32

Smith v. Goguen, 514 U.S. 566 (1974).....31

Thornhill v. Alabama, 310 U.S. 88 (1940).....24, 26

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).....26

United States v. Abrams, et al., Cr. Nos. M-8158-8168-85, M-8173-8185-85 (Oct. 27, 1985).....11

United States v. Grace, 461 U.S. 171 (1983).....28

United States v. Schnitzer, et al., Cr. Nos. M-9562-9583-85 (Sept. 17, 1985).....12, 22

United States v. Strinko, Cr. No. M-1218-85 (July 30, 1985).....11

United States v. Travers, 166 Daily Wash. L. Rprt. 1505 (D.C. Super. Ct., Apr. 2, 1970).....10, 11, 22

White House Vigil for the ERA Committee v. Clark, 746 F.2d 1518 (D.C. Cir. 1984).....27

Zaimi v. United States, 476 F.23d 511, 515 (D.C. Cir. 1973).....11

STATUTES AND REGULATIONS:

18 U.S.C. § 112(b).....passim

D.C. Code § 22-1115.....passim

LEGISLATIVE MATERIALS:

S. Rep. No. 92-1105, reprinted in [1972] U.S. Code Cong. & Ad. News 4316.....29-30

81 Cong. Rec. 8587 (1937).....25

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WILLIAM QUENTIN GRAHAM, IRA I. KORINOW,
AND DOROTHY MAHLIN

Interest of the Amici [1]

The amici are nine citizens of all ages and walks of life who came from seven states to Washington, D.C., on October 22, 1985, to stand quietly, without signs or placards, on the public sidewalk in front of the Soviet Embassy. After precisely five minutes they were arrested and charged with violating the "congregation clause" of D.C. Code § 22-1115, which makes it a criminal offense for three or more persons to "congregate" within 500 feet of a diplomatic facility "and to refuse to disperse after having been ordered to do so by the police. [2] All were convicted and sentenced following a one-day trial. A joint appeal was immediately filed and fully briefed. Lipkin v. United States, Nos. 86-190 -- 86-198 (D.C. Ct. App.). Two days before the scheduled argument, this Court granted certiorari in this case, and the District of Columbia Court of Appeals cancelled argument and ordered that the appeal be "held in abeyance pending decision" in this case.

The statute now before this Court is a District of Columbia criminal statute prosecuted in the District of Columbia courts by the United States Attorney for the District of Columbia. Yet neither the petitioners nor the respondent in this case have ever prosecuted or been prosecuted under the statute, and the

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[1] Counsel for both Petitioners and Respondents have consented in writing to the filing of this brief amicus curiae. Written consents have been filed with the clerk.

[2] The term "congregation" has uniformly been understood to apply to a group of (cont'd)

three or more people. See Kinoy v. District of Columbia, 400 F.2d 761, 769 (D.C. Cir. 1968) (Appendix to Opinion).

decision below is one by a federal court, not the District of Columbia Court of Appeals, which is empowered authoritatively to construe the statute. Amici believe this Court would benefit by considering this case with an eye toward how the statute has actually been applied and construed.

In addition, although the Questions Presented in this case concern the statute as a whole, in fact the parties and the court below have focused attention most closely on the first clause of the statute -- the so-called "flag and banner" provision -- whereas amici and others similarly situated have been prosecuted under the second clause -- the "congregation clause" -- which raises distinct constitutional concerns. 3/

3/ The flag and banner clause is a self-executing statute which prohibits the display of any sign within 500 feet of any (cont'd)

STATEMENT OF FACTS

A. Amici's Trial

In the past 18 months, at least nine trials have been held in the Superior Court of the District of Columbia involving over 120 defendants charged with violating the second clause of D.C. Code § 22-1115. All of these prosecutions have involved peaceful, brief, and unobtrusive "congregations" on the public sidewalk in front of the Soviet Embassy. Every defendant has been convicted and sentenced, and appeals from these convictions are now pending in the

---

diplomatic facility if it tends to bring a foreign government into disrepute. By contrast the congregation clause is not self-executing and on its face is viewpoint-neutral. Yet it is subject to even greater challenge than the flag and banner clause on grounds of overbreadth and vagueness.

District of Columbia Court of Appeals. It is instructive -- particularly in light of the construction placed on the congregation clause by the United States Court of Appeals in this case -- to see how these cases have progressed.

The facts of amici's prosecution are highly representative. At trial the government's entire case consisted of the following stipulation: 4/

> On October 22, 1986, at 1:30 p.m. the nine defendants in this case gathered on the public sidewalk in front of the Soviet Embassy at 1

4/ Prior to trial the defendants moved unsuccessfully to dismiss the criminal informations, first on the grounds that the Congregation clause is unconstitutional under the First and Fifth Amendments to the Constitution, and second that the prosecutions reflected unconstitutional selective prosecution -- specifically the undisputed and unaltered practice of the United States Attorney to prosecute all individuals arrested for "congregating" in front of the Soviet Embassy, while declining prosecution against individuals arrested for identical conduct on the sidewalk in front of the Embassy of South Africa.

> Sakharov Plaza, N.W., Washington, D.C. The date and time of this gathering was arranged in advance by the Metropolitan Police Department. Defendants did not carry any signs or placards and did not shout or chant. They did not harass or interfere with people passing by or entering the Embassy. Each made a short statement of the reasons he or she was present. These reasons related to the Soviet policy of persecuting and violating the human rights of Soviet Hebrew teachers, Jewish activists, and Jews who had applied for permission to emigrate. The statements identified individual cases of ongoing maltreatment.
>
> After four minutes, defendants were ordered by police officers immediately to disperse. Each defendant heard and understood this order, but none responded. One minute after the police warning, the defendants were arrested and taken into police custody.

In their defense, amici sought to introduce evidence justifying their conduct under the common-law defenses of "necessity" and "defense of others." The trial court refused to admit any such evidence (although it did "admit" a lengthy documentary and testimonial

proffer). It found each defendant guilty, and immediately imposed sentenced them. 5/

B. Prior Interpretations of the Congregation Clause

The legal atmosphere in which District of Columbia police and prosecutors seek to enforce the congregation clause and private citizens seek to exercise rights of free speech and assembly in the vicinity of diplomatic buildings is uncertain indeed. The District of Columbia police enforce the statute as written, in all its breathtaking scope. By all appearances, congregants within 500 feet of any embassy

5/ In amici's trial, each defendant was given a fifteen-day suspended sentence and fined fifty dollars. The sentences were stayed pending appeal. Other sentences have been similar, except that in certain cases defendants have refused probation and have served their jail sentences.

are ordered to leave and, if they do not, are immediately arrested. The prosecutor -- the United States Attorney for the District of Columbia -- has a more selective policy: persons arrested in the vicinity of certain embassies are prosecuted, whereas those adjacent to other embassies are not. (Despite thousands of arrests in front of the South African Embassy, for example, not a single prosecution has been brought.)

The District of Columbia Court of Appeals, which as the "state" appellate court of last resort is empowered to authoritatively construe the statute, has never yet done so: all of the known appeals from convictions under the congregation clause are still pending. Similarly, until this case the United States Court of Appeals for the District of Columbia Circuit, although recognizing that the congregation clause is

"functionally separate" from the flag and banner provision, see Zaimi v. United States, 476 F.2d 511,515 (D.C. Cir. 1973), had never ruled on its constitutionality.

The Superior Court judges who have considered challenges to the statute by those prosecuted have not formed a consensus as to what it means. Only once before June 1985 was the congregation clause ever the subject of a judicial ruling on its constitutionality. That case, United States v. Travers, 166 Daily Wash. L. Rptr. 1505 (D.C. Super. Ct., Apr. 2, 1970), involved the arrest of 19 individuals in front of the Japanese Embassy. On defendant's motion to dismiss, both the government and the defense agreed that the clause must be read, according to its plain meaning, to prohibit any congregation within 500 feet of a diplomatic building, regardless of purpose. That construction, however, the

trial judge ruled, "could not withstand constitutional scrutiny":

> Read literally, the second clause of section 1115 constitutes a restraint of speech and assembly that is neither responsible nor proper. As so read, the law is not concerned with the purpose of a meeting but solely with its geographical proximity to a foreign embassy. Id. at 1508.

Rather than dismissing the Information, however, the Travers court attempted to limit the reach of the statute to preserve its constitutionality. The court thus interpreted the clause to prohibit only

> those meetings, held within five hundred feet [of an embassy] which have a direct relationship to that nation, including meetings which have as their purpose an expression of views concerning the government involved, its personnel, or its policies.

Id. at 1508-09 (emphasis added). Two other judges in recent prosecutions have followed Travers. See United States v. Strinko, Cr. No. M-1218-85 (July 30, 1985); United States v. Abrams, et al.,

Cr. Nos. M-8158-8168-85, M-8173-8185-85 (Oct. 27, 1985), Others, including Judge Hannon in amici's case, have upheld the statute without any limiting construction whatsoever. In another case, United States v. Schnitzer, et al., Cr. Nos. M-9562-9583-85 (Sept. 17, 1985), Judge Bowers also upheld the statute, but only after requiring the government to amend the Information to allege that the congregating was "designed or intended to have the policies and/or personnel of the foreign nation or its embassy viewed negatively." No ruling in the Superior Court has ever held the clause unconstitutional and none has ever construed the statute so as to exclude from its reach the conduct of amici -- unobtrusive, quiet gathering of a few individuals near the embassy to protest the resident country's policies.

The opinion of the court of appeals in this case departs from all of these holdings. Although it too upheld the constitutionality of the congregation clause on its face, it did so only after strictly circumscribing police discretion to order dispersal. The statute makes it an offense "to congregate . . . and refuse to disperse after having been ordered to do so by the police . . . ." Recognizing, however, that the legislative purpose behind the congregation clause was the protection of the physical security of diplomatic premises, see Finzer v. Barry, 798 F.2d 1450, 1452 (D.C. Cir. 1986) Judge Bork, writing for the majority, stated that authority to disperse (and therefore to arrest) congregants "may be exercised . . . only when the police reasonably believe that a threat to the security or peace of the embassy is present." 798 F.2d at 1471. As the court later

explained: "[T]he provision is limited by the general purpose which motivated the enactment of the statute as a whole, i.e., protection of the peace and security of the embassy. Dispersals may only be ordered in accord with those purposes." Id. at 1472 n.17. This is by far the most sensitive interpretation of the congregation clause with respect to its two principal flaws: overbreadth and undue police discretion.

ARGUMENT

A. The Construction Below Is Correct, But Abstention May Be Appropriate

If indeed the majority's interpretation is correct, amici have no quarrel with the congregation clause. Obviously the First Amendment right to assembly, although fundamental and entitled to the most solicitous protection, is not absolute. And a

construction which limits police authority to disperse to instances in which they believe that the congregation poses a threat to the security or peace of the embassy, is consistent not only with this Court's precedents, see, e.g., Cox v. Louisiana, 379 U.S. 536 (1965), but also with the undisputed police power to protect public safety and private property. Virtually everyone agrees that the clause as literally worded -- allowing police to disperse or arrest, for any reason or no reason, any collection of three people anywhere within 500 feet of a diplomatic facility -- is fatally overbroad and vague. Of all the various attempts to narrow the statute to preserve its constitutionality, only the majority below avoids tainting the statute with content and viewpoint discrimination. Rather, the majority focuses precisely on the only legitimate basis for limiting

free assembly: protection of physical security and peace. Under the construction adopted below, it is not the content of congregants' thoughts or statements that justifies police authority, but rather, objectively, whether the assembly -- for whatever ostensible purpose it gathered -- poses a threat to security or peace. Judge Bork's construction is also the only formulation that harmonizes the congregation clause of D.C. Code § 22-1115, with 18 U.S.C. § 112(b)(3) which governs "congregation" at diplomatic facilities throughout the rest of the United States. Section 112(b)(3) makes it a crime to "congregate[] with two or more other persons", within one hundred feet of a diplomatic facility with intent to "intimidate, coerce, threaten, harrass a foreign official . . . or obstruct a foreign official in the performance of his duties."

Judge Bork's formulation, however, by no means states the law as currently enforced, either by the District of Columbia Police or the United States Attorney for the District of Columbia. And it is inconsistent with all of the various interpretations placed upon the statute by the District of Columbia Superior Court. The majority decision below is the only opinion to date holding, in effect, that the conduct of amici and others who have been prosecuted to date does not violate the statute, for there has been no suggestion in any prosecution that the police reasonably or otherwise believed that any of the defendants, individually or collectively, posed "a threat to the security or peace of the embassy." Indeed, the stipulated facts in amici's trial are precisely to the contrary.

The interpretation below is also of questionable precedential effect. First, it is arguably dicta, since, strictly speaking, the issue before the court below involved not the congregation clause, but the flag and banner provision of § 1115. 6/ Moreover, it is the District of Columbia Court of Appeals (which has not yet spoken), not the United States Court of Appeals, which is empowered to construe authoritatively a statute applicable only to the District of Columbia. The latter has recognized repeatedly that "[s]o long as the as-yet-unconstrued [local] statute is susceptible of a saving construction, . . . the [federal court [should] hold the matter in abeyance pending its resolution by the District of Columbia Court of

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6/ The opinion below begins: "Appellants are individuals who wish to carry placards opposing the policies of the Soviet and Nicaraguan governments in front of those governments' embassies." 798 F.2d at 1452 (emphasis added).

Appeals." Justice v. Superior Court, 732 F.2d 949, 950 (D.C. Cir. 1984); cf. Hall v. C & P Telephone Co., 793 F.2d 1354, 1356-1357 (D.C. Cir. 1986). Yet it did not do so in this case.

Under these circumstances, the Court may choose to abstain from determining the constitutionality of the congregation clause until the District of Columbia Court of Appeals has had an opportunity to interpret the clause in one of the many appeals fully briefed and awaiting decision there. In Railroad Commission v. Pullman Co., 312 U.S. 496 (1941), this Court held that when a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a

constitutional question. Thirty-four years later, in Harris County Commissioners Court v. Moore, 420 U.S. 77 (1975), this Court reaffirmed Pullman, noting that abstention was "regularly ordered" where, as here, "there is an action pending in state court that will likely resolve the state-law questions underlying the federal claim." Id. at 83-84. This Court has also held that "the decisions of the District of Columbia Court of Appeals on matters of local law -- both common law and statutory law -- will be treated by this Court in a manner similar to the way in which we treat decisions of the highest court of a state on questions of state law." Pernell v. Southall Realty, 416 U.S. 363, 368-69 (1974). Accordingly, this Court may wish to "retain jurisdiction but stay the federal [case] pending determination of the state-law questions in state court."

Harris County Commissioners Court v. Moore, 420 U.S. at 88 n.14. 7/

B. On The Merits, The Interpretation Propounded Below Should Be Affirmed

Should this Court reach the constitutional merits of the congregation clause, amici respectfully suggest that only Judge Bork's interpretation can preserve the constitutionality of what, by its terms, is a paradigmatic overbroad and vague statute. In the Superior Court, those judges who have written opinions on the constitutional challenges have routinely assumed that this blanket ban on the mere congregation of three people within 500 feet of any diplomatic premises

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7/ Once this course of action is made known to the District of Columbia Court of Appeals, we are confident that court will lift the stay it has imposed in amici's appeal and proceed promptly to resolve the merits of that case.

is constitutionally infirm. In United States v. Travers, supra, Judge Greene specifically acknowledged that "[r]ead literally, the second clause of section 1115 constitutes a restraint on speech and assembly that is neither reasonable nor proper." 166 Daily Wash. L. Rptr. at 1506. In United States v. Schnitzer, et al., Cr. No. M-9562-9583-85 (Sept. 17, 1985), Judge Bowers also agreed that the congregation clause as written is unconstitutional. Analogously, in CISPES v. FBI, 770 F.2d 468 (5th Cir. 1985), the United States Court of Appeals for the Fifth Circuit, construing 18 U.S.C. § 112(b)(3) -- which contains a more narrowly tailored "congregation clause" -- agreed with both the district court and the prosecution in that case that the statute could not possibly be construed to preclude peaceful demonstrations unless, at a minimum, they were accompanied by an

intent to violate some other prohibition. The court took pains to emphasize (id. at 477):

> Thus, the statute does not prevent simple peaceful assembly for the purpose of lawful discussion, which of course cannot be made a crime. DeJonge v. Oregon, 299 U.S. 353, 57 Sup. Ct. 255, 81 L. Ed. 278 (1937). It merely prohibits an assembly of persons with the specific intent to commit the offenses which we have held, supra, the government may constitutionally proscribe, and then only within 100 feet of a protected building.

If this Court cannot agree that Judge Bork's interpretation of the congregation clause is correct, amici urge that the clause be declared unconstitutional for the reasons stated in Judge Wald's dissent.

The construction certain judges in the Superior Court have adopted in an effort to save the clause -- requiring that the congregation "have a direct relationship to" or criticize the foreign nation involved -- exacerbates rather than

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alleviates the constitutional problems. Construing the statute in this manner does not limit in any meaningful way the needless overbreadth of the 500-foot ban: no one without some view to express about the foreign government resident in the embassy would be remotely interested in congregating in its vicinity. A similar limitation was explicit, for example, in the Alabama statute at issue in Thornhill v. Alabama, 310 U.S. 88 (1940), yet this Court did not pause for a moment in striking the law down on its face. Indeed, this artificial limitation actually aggravates the constitutional infirmity because it deprives the statute of content and viewpoint neutrality. See, e.g., Schacht v. United States, 398 U.S. 58, 63 (1970).

Moreover, limiting the clause to congregations relating to or critical of the nation whose embassy is nearby does

not advance the legitimate purpose of the congregation clause, which, as both the majority and dissent below agreed, is designed to protect the physical security of the embassy -- not, like the flag and banner clause, to shield foreign diplomats from insult. See 798 F.2d at 1452, 1487. See also 81 Cong. Rec. 8587, 8591 (1937) (comments of Senator Pittman). Clearly, even as construed by certain Superior Court judges, the provision is not "narrowly tailored" to accomplish this goal. See, e.g., Clark v. Community for Creative Nonviolence, 468 U.S. 288, 293 (1984). Terrorists do not "congregate" before they attack embassies. And hostile mobs will not peacefully assemble and then patiently await a police order to disperse. A congregation's critical viewpont does not equate to a physical threat.

True, someone standing within 500 feet could potentially threaten, harrass, or incite others against foreign diplomats. But "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 508-09 (1969). The constitutional means to achieve the government's goal in a manner consistent with the First Amendment is to proscribe the offending conduct, not to deny citizens the right to position themselves on public streets whenever they might engage in otherwise proscribed conduct. That is the plain message of Thornhill and DeJonge v. Oregon, 299 U.S. 353, 364-65 (1937), where the Court stated:

> [First Amendment] rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislature may protect themselves against that

> abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.

The "offending conduct" in this case -- harassment, threats, incitement against foreign diplomats -- is directly addressed by the requirement which the majority below found implied in the clause's very purpose: that police may only lawfully disperse congregations when there are reasonable grounds for fearing a threat to the physical security or peace of the embassy. That standard has been found sufficient by this Court to protect even the most sensitive and important governmental institutions. See White House Vigil for the ERA Committee v. Clark, 746 F.2d 1518, 1526-27 (D.C. Cir. 1984) (holding that the sidewalk outside the White House is a forum in which the "government cannot constitutionally prohibit all expressive activities");

accord, United States v. Grace, 461 U.S. 171 (1983) (Supreme Court building); Edwards v. South Carolina, 372 U.S. 229 (1963) (building housing legislature).

Throughout the litigation in the District of Columbia courts, the government has contended that embassies are different, because United States security forces cannot gain access to their interiors without permission. But where restrictions on activities protected by the First Amendment are at issue, the government must do more than advance a merely rational justification for its policies: it must convince the court that its policies are in fact narrowly tailored to achieve its interests in a manner minimally restrictive of protected speech. See, e.g., Clarke v. Community for Creative Nonviolence, 468 U.S. at 293; United States v. Grace, 461 U.S. 171, 177 (1983); City Council v. Taxpayers for

Vincent, 466 U.S. 789 (1984). Moreover, the implausibility of the government's claim is demonstrated by the fact that the federal statute governing all such installations outside the District of Columbia, 18 U.S.C. § 112(b), employs a much more selective ban limited to assemblies posing a genuine threat to foreign property or personnel. The federal Act, enforced in tandem with local statutes of general application similar to those in the District of Columbia, is considered by the United States Government to provide adequate protection to foreign diplomats and their property all across the United States, including New York City, the headquarters of the United Nations and the residence of many foreign diplomats of ambassadorial rank. 8/

8/ Congress did not extend the 1972 Act to the District of Columbia only because it was advised that "a District law of (cont'd)

In the brief filed in amici's appeal, the United States Attorney has asserted that there are "several plausible reasons why Congress might have chosen to differentiate between embassies in Washington, D.C., and those in other cities." (Brief of Appellee as filed in Lipkin v. United States, Nos. 86-190 -- 86-198 (D.C. Ct. App) at p.14. n.10). But again, the inquiry in a first amendment case is not what "plausible" arguments one "might" make for a particular policy: it is whether those arguments are in fact sufficiently powerful to justify the

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long standing affords similar protection to foreign officials in the Nation's capital." S. Rep. No. 92-1105, reprinted in [1972] U.S. Code Cong. & Ad. News 4316, 4328. But as any comparison of the two statutes reveals, the "District law" goes far beyond providing "similar protection," and disregards the very constitutional protections that Congress was careful to include in the more recent nationwide legislation.

challenged restrictions. See, e.g., United States v. Grace, 461 U.S. at 182-183. The suggestion that embassies in Washington, D.C., are so much more at risk that they require a clear zone from which all groups of more than two people are excluded may not be absolutely irrational, but it certainly strains credulity.

CONCLUSION

It is not amici's intention to argue fully the constitutional overbreadth of the congregation clause or to go beyond mention of the other constitutional defects which the clause, absent an appropriate limiting construction, contains. For one, due process has long evolved beyond tolerating a mandate which leaves the police authority to disperse and arrest within a 500-foot zone for any reason or no reason at all. See, e.g., Smith v. Goguen, 415 U.S. 566 (1974); Coates v. Cincinnati, 402 U.S. (1971);

Shuttlesworth v. Birmingham, 394 U.S. 147 (1969). In addition, the statute violates equal protection, for another provision of the same law, D.C. Code § 22-1116, exempts labor picketting from its proscriptions. See Carey v. Brown, 447 U.S. 455 (1980); Police Department of Chicago v. Mosley, 408 U.S. 92 (1972). These and other points are set forth in the brief of the petitioners and certain other amici and will not be repeated here. Where we perhaps part company with these parties is with respect to the relief this Court should order. Amici respectfully suggests that the constitutionality of the congregation clause can be preserved with -- and only with -- the construction adopted by the majority below, which restricts authority to disperse and arrest to instances where the police have objectively reasonable grounds to believe that "a threat to the security or peace of

the embassy is present." This Court should affirm this construction and thus uphold the constitutionality of the clause. Otherwise it should either declare the statute unconstitutional on its face or abstain from deciding the constitutional question until the District of Columbia Court of Appeals has had an opportunity to construe the statute.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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NO. 86-803

IN THE

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OCTOBER TERM, 1987

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v.

MARION S. BARRY, et al.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE LEGAL AFFAIRS COUNCIL AND YOUNG AMERICANS FOR FREEDOM, INC. AS AMICI CURIAE

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TABLE OF CONTENTS

	PAGE
Table of Authorities	iv
Interest of the Legal Affairs Council and Young Americans for Freedom, Inc.	1
Summary of Argument	4
Argument	6
The District Of Columbia Statute That Prohibits Demonstrators In The District Of Columbia From Carrying Placards Expressing Criticism Of A Foreign Government Within 500 Feet Of A Building Used By A Foreign Government, Is Not A Narrowly Tailored Restriction Of Free Speech Designed To Meet The Government's Interest In Fulfilling Its Obligations Under International Law	6
I. The Dignity Interest	
If Ever The Interest Existed, The Dignity Interest Does No Longer, Has Never Been Compelling, And In Any Event, Adverse Placards Are Not An Affront To One's Dignity; Furthermore, Expression Of Political Beliefs Is Protected Speech Under The First Amendment.	

A. If Ever The Interest Existed, The Dignity Interest Does No Longer 14
B. If A Dignity Interest Can Be Found, It Is Neither Clear Nor Compelling 22

C. Should A Dignity Interest Be Found Compelling, Placards Expressing Political Dissent Are Not An Affront To Dignity . . 31

D. Even Should One View A Placard Expressing Political Dissent As An Affront To One's Dignity, The Expression Is Protected Speech Under The First Amendment . . 35

II. The Security Interest

Though The Security Interest May Be A Compelling Governmental Interest, Selecting For Special Treatment Only Those Demonstrators Carrying Signs Expressing Criticism Of the Nation Represented By The Foreign Mission, Does Not Meet The Requirement That The Statute Be Necessary And Narrowly Tailored, Since The 500 Foot Zone Bears No Relation To The Security Interest

A. The 500 Foot Requirement Bears No Relation To The Security Interest, So Is Neither Necessary Nor Narrowly Tailored To Further That Interest . . 37

B. Customary Practices In The International Community Do Not Support The Necessity For Section 22-1115 46

Conclusion 53

TABLE OF AUTHORITIES

CASES

Finzer v. Barry, 798 F.2d 1450 (1986) 1, 15, 29, 50

Frend v. U. S., 100 F.2d 691 (1938) 12, 13, 14

Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) . . 6, 36

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) 5, 8

Reid v. Covert, 354 U.S. 1 (1957) . 6, 35

Respublica v. DeLongchamps, 1 U.S. (1 Dall.) 111 (Pa. 1784) 18

U. S. v. Hand, 26 F.Cas. 103 (C.C.D. Pa. 1810) 19

STATUTES

18 U.S.C. Section 112 . . . . . 40, 41, 43

22 U.S.C. Section 254 . . . . . 24, 48

Section 4301 49

Section 4305 49

28 U.S.C. Section 1364 24

Crimes Act of 1790, 1 Stat. 118 . 19, 24

22 D.C. Code Section 1115 . . . . passim

Section 1116 7

LEGISLATIVE MATERIALS

Contitution of the United States, Art. I, Sec. 8, cl. 10 . . . . . 9, 16

Constitution of the United States, First Amendment . . . . . passim

H. R. Rep. No. 94-1614, 94th Cong., 2d Sess. 2 40

81 Cong. Rec. 8589 (1937). 29

FOREIGN ACTS

Act of Anne, 1708, 7 ANNE, c. 12 . 17, 18

Diplomatic Immunities Restriction Act, 1955, 4 ELIZ. 2 c. 21, Section 1 51

TREATY

Vienna Convention Article 4-2 . . 26
Article 22-2 . . passim
Article 31 . . . 25

TREATISES AND ARTICLES

M. Benedek, The Diplomatic Relations Act: The United States Protects Its Own, 5 Brooklyn J. Int'l L 379 (1979) 22, 23

W. Blackstone, 4 Blackstone's Commentaries on the Laws of England (1st ed. 1765-1769) 18

E. Dickinson, The Law of Nations as Part of the National Law of the United States, 101 U.Pa. L. Rev. 26 (1952) 18

R. Garley, Compensation for "Victims" of Diplomatic Immunity in the United States: A Claims Fund Proposal, 4 Fordham Int'l L.J. 135 (1980) . . . 38

L. Green, Trends in the Law Concerning Diplomats, 19 Candian Yearbook of Int'l L. 132 (1986) 34

M. Griffin, Diplomatic Impunity, Student Lawyer, Oct. 1984, ... 49

Kerley, Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities, 56 Am.J. Int'l L. 88 (1962) 28

L. Levy, Constitutional Opinions, Aspects of the Bill of Rights (1986) 7

W. Marmon, Jr., The Diplomatic Relations Act of 1978 and Its Consequences, 19 Va. J. Int'l L. 131 (1978) 24

Moore, 4 International Law Digest (1906) 27

L. Preuss, Projection of Foreign Diplomats and Consular Premises Against Picketing, 31 Am.J. Int'l L. 705 (1937) 21, 23 30

Recent Development Comment Ambassadors and Consuls-First Amendment and International Law, 27 Va. J. Int'l L. ____ (1987) 22

E. Satow, Satow's Guide to Diplomatic Practice III (5th ed. 1979) 45

J. Story, Commentaries on the Constitution of the United States (1833) 17

Treaties, Extradition and Diplomatic Immunities: Some Recent Developments, 35 Int'l & Comp. L.Q. 425, (1986). 25

Vattel, The Law of Nations (1879) . . 10

Miscellaneous

Declaration of David Fields, Joint Appendix 38, 46

Declaration of James E. Nolan, Joint Appendix 46

Declaration of Thomas D. Quinn, Joint Appendix 38

Demonstrations Denouncing U.S. Policy Mounted in Moscow, Wash. Post, Oct. 2, 1984 Joint Appendix 47

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INTEREST OF THE LEGAL AFFAIRS COUNCIL AND YOUNG AMERICANS FOR FREEDOM, INC.

The Legal Affairs Council ("the Council") and Young Americans for Freedom, Inc. ("YAF") are conservative organizations dedicated to the protection

of conservative values. Of the highest priority to these organizations, is the protection and preservation of individual liberties guaranteed under the U.S. Constitution.

The assault on free speech effected by Judge Bork's opinion in Finzer v. Barry, 798 F.2d 1450 (1986) is a nonpartisan issue, as evidenced by the wide spectrum of philosophies represented by amici curiae. The Council and YAF, with the written approval of both petitioners and respondents on file in the office of the clerk, submit this amici curiae brief in support of the petitioners, Michael Boos, Bridget Booker and J. Michael Waller.

This brief is not duplicative of petitioners' brief, but has focused on the issue of whether the 500 foot restriction contained in the challenged

statute, D.C. Code Section 22-1115, implements customary standards of international law and furthers international relations, and whether the goals of the 1961 Articles of the Vienna Convention, which were subsequently ratified by the United States, are met by the statute.

Has the government of the District of Columbia carried its burden to establish that the statute is necessary and restricts free speech only for the purpose of reaching a compelling governmental interest, and that the restriction is narrowly tailored to reach that end? The opinion reached by the amici curiae is that the government has not established that the 500 foot restriction bears any relation to any compelling governmental interest.

SUMMARY OF ARGUMENT

The challenged statute, D. C. Code Section 22-1115, while effectively strangling the expression of certain political opinion in the District of Columbia, does nothing to effectuate the obligation of the United States, which arises under international law, to protect foreign representatives stationed in this country. The Court below upheld the statute as protecting an interest in maintaining the dignity of a foreign mission. Except during Congressional argument on the passage of the challenged statute, there is no evidence that a pure dignity interest has ever existed. Even if those arguments taking place fifty years ago are persuasive, any perceived dignity interest is certainly not compelling, as it must be for the statute to survive a First Amendment challenge.

Perry v. Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

Finding a pure dignity interest and then finding it compelling is an insurmountable task; if accomplished, the statue remains unconstitutional for failure to be narrowly tailored or necessary, since peaceful demonstrations offer no affront to a nation's dignity.

The Court below and respondents have failed to connect the statute to any governmental interest in protecting the safety and security of foreign missions, since the provisions of the statute bear no relation to the security of foreign missions.

Whatever arguments are offered in support of the statute, they cannot overcome the fact that a viewpoint-based restriction, such as Section 22-1115, cannot withstand First Amendment

challenge. Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984). In addition, political dissent is protected speech under the First Amendment. Reid v. Covert, 354 U.S. 1, 16 (1957).

The statute reaches no compelling governmental interest so is neither necessary nor narrowly tailored. Finally, the challenged statute restricts free speech based the viewpoint expressed, so is unconstitutional on its face.

ARGUMENT

THE DISTRICT OF COLUMBIA STATUTE THAT PROHIBITS DEMONSTRATORS IN THE DISTRICT OF COLUMBIA FROM CARRYING PLACARDS EXPRESSING CRITICISM OF A FOREIGN GOVERNMENT WITHIN 500 FEET OF A BUILDING USED BY A FOREIGN GOVERNMENT, IS NOT A NARROWLY TAILORED RESTRICTION OF FREE SPEECH DESIGNED TO MEET THE GOVERNMENT'S INTEREST IN FULFILLING ITS OBLIGATIONS UNDER INTERNATIONAL LAW.

> "Belief in the existence of witches, the flatness of the earth, and the divine right of kings are among the fighting faiths that have been discarded in the free exchange of ideas."[1]

Michael Boos, Bridget Booker and J. Michael Waller wish to demonstrate in front of the embassies of the Soviet Union and Nicaragua, while walking on public sidewalks carrying placards which express political opinions. By this simple statement of their political beliefs, they will be subject to arrest for the violation of D.C. Code Section 22-1115 [hereinafter "22-1115" or "the D.C. statute"], and if convicted, under D.C. Code Section 22-1116, they will be punished by a fine, imprisonment or both.

Public streets and sidewalks are traditional public forums and content

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[1]L. Levy, Constitutional Opinions, Aspects of the Bill of Rights 3(1986).

neutral restrictions on speech at these sites may limit the time, place and manner of expression only if the regulation is narrowly tailored to serve a significant governmental interest. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). A restriction that is content-based must withstand an even higher level of judicial scrutiny to survive. Id. Under Perry Educ. Ass'n v. Perry Local Educators' Ass'n, a content-based restriction on free speech in a traditionally public forum must be necessary to serve a compelling state interest, and narrowly tailored to do so. The content-bias of 22-1115 is self-evident and amply discussed in petitioners' brief.

This amici argument concerns the three sources of legal obligation on

which respondents and the Court below relied to support their position:

The Constitution

Under the authority of Article I, Section 8, Clause 10 of the Constitution of the United States, "the Congress shall have the Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations". Under the First Amendment of the Constitution "Congress shall make no law . . . abridging the freedom of speech".

The Treaty

Representatives of foreign nations serving abroad have traditionally been accorded special treatment under prescription generally designated as the

Law of Nations.[2] The treatment of foreign representatives was codified as the result of the 1961 Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, 3237, TIAS No. 7502 [hereinafter "the Vienna Convention"]. Article 22 of that treaty reads:

> 2. The receiving State is under a special duty to take all <u>appropriate steps</u> to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity. (emphasis added) [hereinafter "Article 22-2"]

When the treaty was signed in 1961 by one hundred and twelve nations, including the United States, it became part of the Law of Nations. The treaty became effective with respect to the United States in 1972, at which time the

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[2]Vattel, <u>The Law of Nations</u>, 464-65 (1879) [hereinafter "Vattel"].

United States was obligated to fulfill the requirements of Article 22-2. It is stated in the Prelude to the Articles of the Vienna Convention that the States party to the Convention realize "that the purpose of [diplomatic] privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States . . . ." (emphasis added)

The Court below identified two interests expressed in Article 22 of the Vienna Convention; the interest in protecting missions from violence (the security interest) and in protecting them from impairment of their dignity (the dignity interest).

The Statute

In 1938, D.C. Code Section 22-1115

was passed by Congress, twenty-three years before the United States signed the Articles of the Vienna Convention. It is argued that the statute effectuates the Vienna Convention. The D.C. statute states in part that:

> [i]t shall be unlawful to display any . . . placard . . . designed . . . to intimidate, coerce or bring into public odium any foreign government . . . or to bring into public disrepute political, social, or economic acts . . . of any foreign government, or to interfere with the free and safe pursuit of the duties of any diplomatic or consular representatives of any foreign government, within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its . . . representatives as an embassy, ligation, consulate or for other official purposes . . . ." [hereinafter "22-1115" or "the D.C. Statute"].

Respondents rely heavily on Frend

v. U.S., 100 F.2d 691 (1938) [hereinafter "Frend"] to support the contention that the D.C. Statute is a valid effectuation of U.S. obligation under international law as defined by Article 22-2. Citing no case authority, Frend was decided by giving complete deference to the legislative intent behind the D.C. Statute as expressed by Senator Pittman. Id. at 693. Frend is a regrettable example of the judiciary working hand in glove with the legislature rather than acting as a constitutional check on the activities of Congress.

In addition, Frend was decided before First Amendment law began to develop. That is readily apparent from the language contained in the opinion:

> [The restrictions of 22-1115] are reasonable and proper restrictions . . . . [A] municipality may control and regulate the use of the streets in the

> general good . . . . The control or prohibition of any of these things cannot be regarded as interfering with the constitutional right of assembly or of speech. (emphasis added)

Id. The respondents and Judge Bork are relying on a case that applied a "reasonable and proper" standard to a content-based restriction on free speech. Frend contains no hint of the level of scrutiny which must be survived today to uphold a content-based restriction on free speech and should be overruled.

In the fifty years since Frend, First Amendment law has developed. Judge Groner, the author of the Frend opinion, might be shocked to find that, today, municipalities do not have a free hand in regulating free speech on public sidewalks.

I. THE DIGNITY INTEREST

IF EVER THE INTEREST EXISTED, THE DIGNITY

INTEREST DOES NO LONGER, HAS NEVER BEEN COMPELLING, AND IN ANY EVENT, ADVERSE PLACARDS ARE NOT AN AFFRONT TO ONE'S DIGNITY; FURTHERMORE, EXPRESSION OF POLITICAL BELIEFS IS PROTECTED SPEECH UNDER THE FIRST AMENDMENT.

A. If Ever The Interest Existed, The Dignity Interest Does No Longer.

The Respondents and Judge Bork rely on early treatises and the remarks of Senator Pittman during debate on the passage of 22-1115 to justify upholding the 500 foot zone based upon the dignity interest. Finzer v. Barry, 798 F.2d 1450, 1457 (1986) [hereinafter "Finzer"]. However, from reading eighteenth and early nineteenth century commentaries on a nation's duty to protect an ambassador or embassy from insult, it is clear that the meaning attributed to "insult" or "affront to dignity" in earlier centuries did not carry the same meaning it did for

Senator Pittman and does today for Judge Bork. As discussed below, examples of "insult" in earlier times contain, without fail, a physical component implying a threat to safety. Even if the meaning were identical, the tenor of current international relations on the basis of reciprocity and functional necessity, as discussed below, belies attaching the same meaning or importance to what might have been considered an affront to dignity in an earlier day.

It is no coincidence that the clause of the United States Constitution granting Congress the power to effectuate the Law of Nations first speaks of defining and punishing piracies and felonies on the high seas. U. S. Const., art. I, section 8, cl. 10. It appears that the primary concern of the framers was the Law of Nations as it applied to

maritime and merchant intercourse among nations. Great play was given the reference to piracy and laws affecting our commercial activity with other countries.[3] Certainly the manner in which the discourse among sovereign states was carried out was of concern, but not of primary importance in the consideration of the Law of Nations.

Early examples of international reaction to "affronts to the dignity" of an ambassador uniformly concerned physical assault on his person or threat to his safety. In 1708, the Act of Anne[4] became law in England as a response to the arrest of the Russian ambassador by

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[3]J. Story, Commentaries on the Constitution of the United States, Sections 1158-1160 (1833).

[4]An Act for Preserving Privileges of Ambassadors and Other Public Ministers of Foreign Princes and States, 1708, 7 ANNE, c. 12.

"turbulent and disorderly persons".[5] The arrest, which entailed taking the ambassador violently from his coach and holding him in custody for several hours, was considered an "insult" to the ambassador. In response, the Act voided pending suits against ambassadors and proscribed their future arrests, finding such treatment of ambassadors contrary to the Law of Nations. Id.

Blackstone instructed that the Act of Anne stated no new concepts, but rather memorialized accepted practice in the treatment of ambassadors.[6]

In Respublica v. DeLongchamps, 1 U.S. (1 Dall.) 111 (Pa. 1784), a case of first impression in the United States,

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[5]E. Dickinson, The Law of Nations as Part of the National Law of the United States, 101 U. Pa. L. Rev. 26, 30 (1952).

[6]W. Blackstone, 4 Blackstone's Commentaries on the Laws of England 70-71 (1st ed. 1765-1769).

the defendant was convicted of first threatening and then striking a member of the French legation in Philadelphia. His action was found clearly contrary to the Law of Nations. Six years later, the first Congress passed the Crimes Act of 1790,[7] a substantial imitation of the Act of Anne, which stated:

> [I]f any person shall violate any safe-conduct or passport duly obtained and issued under the authority of the United States, or shall assault, strike, wound, imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister, such person so offending, on conviction, shall be imprisoned not exceeding three years, and fined at the discretion of the court.

In United States v. Hand, 26

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[7]Act of Apr. 30, 1790 ch. 9, Section 26, 1 Stat. 118, as amended, 22 U.S.C. Sections 252-254 (1976)(repealed 1978).

F.Cas. 103 (C.C.D.Pa. 1810), is found the first mention of the nation's interest in protecting diplomats from "insults [as well as] personal injury". However, the action at issue was the intentional firing of a gun into the Russian Embassy, and the Court made clear that its use of the word "insult", meant an insult to the minister amounting to assault, when the defendant placed him in fear for his life. Nothing in the opinion suggests that words alone, conveyed orally or in writing, would produce the same result.

The Mexican Minister sent a note on May 11, 1911 to Secretary of State Hull in the earliest reported incident of picketing a foreign mission. He complained that demonstrators were standing outside the Mexican Consulate in Douglas, Arizona, making insulting remarks to consulate personnel as they

left the building. He requested that the government issue appropriate "orders as may be necessary to secure the personnel of the Mexican Consulate . . . from such annoyances on the territory of this friendly nation". Secretary Hull replied that he had referred the matter for appropriate action.[8] The appropriate action taken was no action.

It has been suggested, and the current method of conducting foreign affairs supports the suggestion, that a pure dignity interest no longer exists and "[e]xclusive reliance on [it] in support of the D.C. Statute's prohibition on anti-embassy protests is highly

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[8]L. Preuss, Protection of Foreign Diplomats and Consular Premises Against Picketing, 31 Am.J. Int'l L. 705, 708 n.10 (1937) [hereinafter "L. Preuss"].

suspect."[9] Taking that sentiment one step further, it is clear from the early cases concerning insults, supra, that there never was a pure dignity interest unconnected to the threat of violence.

B. If A Dignity Interest Can Be Found, It Is Neither Clear Nor Compelling.

Upon examining the traditional treatment accorded foreign representatives, it is apparent that the overriding concern has been for their safety and for their freedom to perform their duties without interference.[10] The duty to prevent interference "follows as a corollary of the foundation principle

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[9] Recent Development Comment, Ambassadors and Consuls-First Amendment and International Law, 27 Va. J. Int'l L. ____, ____ (1987) [hereinafter "Comment, Ambassadors and Consuls"]

[10] M. Benedek, The Diplomatic Relations Act: The United States Protects Its Own 5 Brooklyn J. Int'l L. 379, 384-85 (1979) [hereinafter "Benedek"].

of diplomatic immunities: the obligation to assure the unimpeded exercise of diplomatic functions".[11] In the ancient days of diplomacy, a foreign ambassador derived his right to diplomatic immunity because he assumed the role of the personal representative of the sovereign.[12] The theory of personal representation is based on comity and reciprocity among sovereign nations: one would offer the representative no lesser treatment than one would offer the sovereign himself.[13] The commonly recognized end served by granting foreign ministers diplomatic privileges and immunities today, as stated in the prologue to the Vienna Convention, is to remove those impediments which would

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[11] L. Preuss, supra, note 8 at 708.

[12] Benedek, supra, note 10 at 383.

[13] Vattel, supra, note 2 at 465.

prevent a diplomat from accomplishing his tasks: the representation of his State in international affairs. This is the theory of functional necessity, and it has overtaken the ancient theory of personal representation.[14]

Though, in the past, diplomatic immunity was a cloak that completely enshrouded the foreign minister, diplomatic immunity is no longer all encompassing.[15] The Diplomatic Relations Act of 1978, 22 U.S.C. Section 254 and 28 U.S.C. Section 1364, repealed the Crimes Act of 1790, 22 U.S.C. Sections 252-254. Under the Act of 1978, diplomats must carry liability insurance for the vessels and motor vehicles they operate, and

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[14]W. Marmon, Jr., The Diplomatic Relations Act of 1978 and Its Consequences, 19 Va. J. Int'l L. 131, 132 (1978).

[15]Id. at 136-37.

further, the Act creates a federal right of direct action against the insurance company which issued insurance on the diplomat's vehicle. 28 U.S.C. 1364. In 1983, Congress amended the Act to make it incumbent on each embassy to be responsible for the liability coverage of its diplomats. 22 U.S.C. 254(e).

Under Article 31 of the Vienna Convention, diplomats are no longer immune from certain law suits arising from activity conducted by the diplomat in a purely private capacity. However, diplomats retain total immunity from criminal prosecution, which is consistent with the functional theory of diplomatic immunity; a diplomat cannot perform his necessary functions if he is incarcerated. The tide has turned; diplomats are no longer a complete law unto themselves.

In determining whether complying with international custom subsequently codified by the Vienna Convention is always a compelling governmental interest, the following example is instructive. Customary practice in receiving and sending foreign emissaries, which became Article 4-2 of the Vienna Convention, states that no foreign nation is obligated to accept any emissary from another nation, and no reason need be given. When, however the Austro-Hungarian Minister in the District of Columbia informed President Cleveland that a minister with a Jewish wife was not acceptable to Vienna, though under accepted rules of customary practice a nation was permitted to refuse any foreign minister, the President responded that refusal on the ground of religious belief was "so destructive of religious

liberty and freedom of conscience, so devoid of catholicity, and so opposed to the spirit of the age, that it [can] not be accepted by the great family of civilized nations, nor by the people of the United States."[16]

It appears that, though the United States had assumed international obligations under customary rules of diplomacy, the individual's First Amendment right to freedom of religion prevailed over that obligation.

After viewing diplomatic immunity and special privilege and treatment in historical perspective, it becomes increasingly difficult to accept Judge Bork's rationale for finding a compelling need to protect a foreign representative from any "affront to his dignity" that

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[16]Moore, 4 International Law Digest 481 (1906).

might be caused by placards critical of his nation's policies, where that affront does not interfere with his ability to perform his duties. Neither is the special treatment accorded diplomats under 22-1115 an "appropriate step" towards meeting the United States' commitment under the Vienna Convention, Article 22-2, especially when it is at the expense of the constitutional rights of American citizens. Furthermore, discussion by the drafters of Article 22-2 centered on ensuring the safety of the mission, casting doubt on how compelling they found any dignity interest.[17]

A portion of Senator Pittman's arguments for passage of the statute containing the 500 foot zone, which were

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[17]Kerley, Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities, 56 Am.J. Int'l L. 88, 104-05 (1962).

so persuasive to Judge Bork, relate to the security interest, which will be addressed below. He does discuss, however, that ambassadors must be protected "against any character of annoyance or interference that will bring the hatred of the people of his country against our people." 81 Cong. Rec. 8589 cited in Finzer at 1457. When did the favorable opinion of the citizens of a foreign nation become a more compelling interest to this nation than the individual's right to express his political opinion freely as guaranteed by the U.S. Constitution? When did this nation develop a more compelling need to have the Soviet citizens "like" us, than that the world know that this nation stands for individual freedoms? When did this nation fall victim to the argument that a placard carried in front of the

Nicaraguan Embassy saying "Stop the Killing" is a sufficient affront to the dignity of that nation's representative that it must be prohibited, while the same sentiment baldly expressed through the newspapers or television or on the floor of the United Nations is permissible?

In Senator Pittman's day, there was no television and perhaps the newspapers were more circumspect in reporting. In addition, the concept of picketing foreign embassies as an expression of political dissent was relatively new.[18] Though one may have some vague understanding of why the D.C. Statute was passed, it was as invalid then as it is now since any dignity interest it arguably serves, absolutely cannot be called compelling.

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[18]L. Preuss, supra, note 8 at 706.

C. Should A Dignity Interest Be Found Compelling, Placards Expressing Political Dissent Are Not An Affront To Dignity.

An underlying premise of the 500 foot buffer zone is that picketers carrying signs critical of a foreign government deliver an affront to that nation's dignity. Exercising the right of dissent, even in graphic terms, is no affront to a nation's dignity. The United States has an obligation to accord a foreign nation the status of an equal in the international community; it has no obligation to shield that nation from individual freedoms exercised by American citizens. The United States may treat a nation as an equal without agreeing with the policies of that nation. When Soviet citizens parade past the U.S. Embassy in Moscow carrying placards that say "No

More Missiles", that is not an affront to the dignity of the United States, the United States accepts it at face value as an expression of disagreement with U.S. policy.

It is disingenuous to claim that the representatives of the Soviet Union might find it a greater affront to read "Free Sakharov" on a placard outside the embassy, than seeing or hearing the same sentiment expressed via every other medium. One imagines it would not be the first time this sentiment had been expressed, nor the last. It is ironic that the name of the site where the Soviet Embassy is located has been renamed Andrei Sakharov Plaza. Is that any less an affront to the Soviets? And whether it is or not, is it of such importance that this nation should intervene at the expense of the right to

free speech? Under First Amendment standards established by this Court, the answer is no.

Notwithstanding Senator Pittman's personal opinion to the contrary, to maintain that a message relayed via a placard outside the mission is an intolerable affront to one's dignity while the same message relayed via television or radio inside the mission is not, is disingenuous in the extreme. To claim that seasoned diplomats, as they must be if stationed in the District of Columbia, find a placard an affront to their nation while the same words spoken on the floor of the United Nations or the Congress of the United States are not, lacks all credibility.

In the words of Sir Pierson Dickson, Britain's ambassador to France in 1964:

> The function of the diplomatist is to understand the government, the people, the problems and aspirations of the country to which he is accredited; to interpret them faithfully and accurately to his own Government, whose point of view he must present with the same precision . . . .[19]

By common definition the diplomat has entered the marketplace of ideas. Under the functional view of diplomacy, an attempt to isolate the diplomat from certain segments of the American population, or opinions held by certain individuals, does the diplomat a disservice; it prevents him from efficiently executing his duty to present American views to his master. Any discernable interest in "protecting"

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[19]Address to the International Diplomatic Academy, June 18, 1964, cited in L. Green, Trends in the Law Concerning Diplomats, 19 Canadian Yearbook of Int'l L. 132, 154 (1986).

diplomats from the vitality of the American marketplace on the basis of finding the expression of political dissent an affront to his dignity cannot withstand First Amendment attack.

D. Even Should One View A Placard Expressing Political Dissent As An Affront To One's Dignity, The Expression Is Protected Speech Under The First Amendment.

Under Article 22-2 of the Vienna Convention, the United States is obligated to take appropriate steps to prevent impairment of a nation's dignity. Contravening the U. S. Constitution is not an appropriate step to effectuating an international treaty. Reid v. Covert, 354 U.S. 1, 16 (1957).

No authority has been cited by either Judge Bork or the respondents that any other nation has interpreted Article 22-2 as restrictively as did the judicial

branch of the United States in this case below. Quite the contrary, other signatories to and obligors under the Vienna Convention, such as the Soviet Union and Great Britain, have erected no obstacles to political expression via placard. Infra, at 44-46.

Under established constitutional principles, an argument that the dignity interest is a compelling governmental interest and that Section 22-1115 is an appropriate step to meet this international obligation under Article 22-2, cannot stand because it simply has no legal foundation.

In addition, as plainly demonstrated in petitioners' brief, a viewpoint based restriction, as Section 22-1115 clearly is, cannot withstand a First Amendment challenge. Members of the City Council of Los Angeles v.

Taxpayers for Vincent, 466 U.S. 789 (1984).

II. THE SECURITY INTEREST

THOUGH THE SECURITY INTEREST MAY BE A COMPELLING GOVERNMENTAL INTEREST, SELECTING FOR SPECIAL TREATMENT ONLY THOSE DEMONSTRATORS CARRYING SIGNS EXPRESSING CRITICISM OF THE NATION REPRESENTED BY THE FOREIGN MISSION, DOES NOT MEET THE REQUIREMENT THAT THE STATUTE BE NECESSARY AND NARROWLY TAILORED, SINCE THE 500 FOOT ZONE BEARS NO RELATION TO THE SECURITY INTEREST.

A. The 500 Foot Requirement Bears No Relation To The Security Interest, So Is Neither Necessary Nor Narrowly Tailored To Further That Interest.

There can be little argument that keeping foreign representatives safe while they reside and work in this country maintaining the flow of international communications, is a compelling governmental interest. As

early as the days of ancient Greece, it was recognized that "immunity of foreign diplomats was an essential element of peaceful intercourse between nations."[20] However, there is no relationship between this well-established duty and the 500 foot zone of the D.C. Statute.

There is nothing to suggest that only those demonstrations involving the use of adverse placards result in violence. In fact, is it not logical that someone intending violence might conceal his hostile intent beneath a "friendly" sign? As supported by appellees' own affidavits,[21] an initially peaceful demonstration of any persuasion may erupt

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[20]R. Garley, Compensation for "Victims" of Diplomatic Immunity in the United States: A Claims Fund Proposal, 4 Fordham Int'l L.J. 135, 138 (1980).

[21]Declaration of David Fields, Joint Appendix at 17-18; Declaration of Thomas D. Quinn, Joint Appendix at 21.

into violence. There is no suggestion a demonstrator supporting the country represented by the subject embassy, or a demonstrator against that country who does not carry a placard, is any less likely to trigger a fracas than a demonstrator carrying an adverse placard.

Whether or not Congress, in passing the 500 foot restriction, was concerned with the security interest, since only a certain class of demonstrators carrying a certain class of signs was banished to beyond the 500 foot zone, no security interest is met by the 500 foot restriction. Had Congress been concerned that placards might be used as weapons, <u>all</u> signs should have been restricted to beyond the 500 foot buffer zone. Had Congress felt adverse demonstrators without signs presented a security risk, <u>all</u> adverse demonstrators

should have been restricted to beyond the 500 foot zone.

An additional indication that the 500 foot buffer zone is not a narrowly tailored restriction to provide for diplomatic safety, is that in 1972 Congress amended 18 U.S.C. Section 112, which regulated demonstrations near a building occupied by foreign representatives in any jurisdiction within the United States other than the District of Columbia. The amendment contained restrictions on picketing similar to Section 22-1115. In 1976, 18 U.S.C. Section 112 was again amended, removing the restriction on picketing since it restricted speech protected by the First Amendment.[22] Under 18 U.S.C. Section 112(b), one may not

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[22]H. R. Rep. No. 94-1614, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Ad. News 4480, 4484 n.9.

"intimidate[ ], coerce[ ], threaten[ ], or harass[ ] a foreign official . . . or obstruct[ ] a foreign official in the performance of his duties" or attempt to do so; and one may not congregate with two or more persons within 100 feet of a building occupied by foreign representatives with the intent to violate any provision of this section of the statute. If this type restriction is sufficient to protect the safety of diplomats working and residing in New York City, surely it is sufficient in the District of Columbia. Placards present no greater threat to the safety of diplomats in the District of Columbia than they do in San Francisco, Miami or New Orleans.

The facile assertion that foreign offices are concentrated within the District of Columbia cannot be reconciled

with the facts. By estimates of the U.S. State Department and the New York City Commission for the United Nations and Consular Corps, there are, at present, approximately 137 embassies in Washington, D. C., while there are approximately 247 permanent missions to the United Nations and consulates in New York City.

The argument that the disparity of treatment is somehow necessary because the diplomatic community in the District of Columbia maintains a higher profile or because the nation's capital attracts more media attention is demonstrably unrelated to the security interest and thus without merit.

The competing interests involved in the present argument are the security of diplomatic missions against the individual's right to express a political

opinion. It is unthinkable that so fundamental a right as unfettered expression of political beliefs should be restricted except under exigent circumstances, and even then, only in the narrowest and least inhibiting manner. The 500 foot zone-- affecting as it does only a certain class of demonstrators who constitute no greater threat to an embassy's security than any other class of demonstrators--cannot be considered a narrowly tailored restriction.

Throughout the nation, to the extent any restriction is deemed necessary, the 100 foot limit for demonstrators congregating with the intent to violate 18 U.S.C. 112 is thought sufficient to protect the safety of missions. In addition, though an earlier version of 18 U.S.C. 112 contained a prohibition on placards, the

Code section was amended in 1976 to drop that restriction. Furthermore, in a metropolitan area like the District of Columbia, carrying a sign 500 feet away may mean not delivering your message. That is more than the minor inconvenience of being denied the best backdrop for catching media attention, as suggested by Judge Bork in his opinion below. Finzer at 1462.

The consequence is that, though presenting no threat to the security of an embassy, one solitary individual is prevented from standing on a public street to deliver a message directly to those foreign service officers who might carry the message home or otherwise be affected by it. Five hundred feet means down the street and around the corner in a densely developed city like Washington, D. C. This severe restriction of free

speech which contributes nothing to fulfilling an obligation of the United States under international law should not be tolerated.

A narrow interpretation of what steps are "appropriate" is that given by a contemporary commentator:

> "[T]he extent of protection provided must be proportionate to the risk or threat to the premises . . . . [If the host government] knows of an impending hostile demonstration, or if the ambassador informs it of an intrusion or an impending attack, then it is obliged to provide protection proportionate to the threat or to remove the intruders on request.[23]

Section 22-1115 far exceeds what might be viewed as a narrowly tailored "appropriate step" to effectuate a

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[23]E. Satow, Satow's Guide to Diplomatic Practice III (5th ed. 1979) quoted supra, note 9 in Comment, Ambassadors and Consuls, at _____.

legitimate governmental interest.

B. Customary Practices In The International Community Do Not Support The Necessity For Section 22-1115.

The affidavits in support of the 500 foot zone, speaking only to the security interest of the statute, state that the zone is necessary to insure that Americans serving abroad in the Foreign Service receive the same treatment as those foreign diplomats who serve in the District of Columbia.[24] That argument is academic, since striking the 500 foot zone would have no impact on the security of embassies, as stated above and reinforced by the fact that other countries bound by the same international obligation represented by the Vienna

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[24]Declaration of David Fields, Joint Appendix at 16-17; Declaration of James E. Nolan, Joint Appendix at 24-25.

Convention do not feel the need to be as restrictive as Section 22-1115.

The Soviet Union, a signatory to the Vienna Convention, finds neither conflict with that treaty nor any threat to the security of the U.S. Embassy in Moscow when it allows, in fact stages, a demonstration with adverse placards directly in front of the U.S. Embassy in their nation's capital. Demonstrations Denouncing U.S. Policy Mounted in Moscow, Wash. Post, Oct. 2, 1984, Joint Appendix at 32. Whatever that demonstration expressed, the Soviet Union was not concerned it might present a danger to U.S. personnel. It is doubtful that the dignity issue was even considered.

In Great Britain, with its tradition of free speech, though a policewoman was shot during a demonstration in front of the Libyan

Embassy and the public was outraged, the government did not feel that it could ban demonstrations in front of the embassy "as long as they do not imperil the safety or efficient work of the mission."[25] Great Britain was also a signatory to the Vienna Convention. That the descendants of the reluctant hosts of the Boston Tea Party are now protecting free speech more vigorously than the heirs of the American revolutionaries, is indeed ironic.

Foreign relations today are carried on on the basis of reciprocity. Under 22 U.S.C. Section 254(c) of the Diplomatic Relations Act of 1978, the President may grant greater or lesser immunity than that provided under the

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[25] Treaties, Extradition and Diplomatic Immunities: Some Recent Developments, 35 Int'l & Comp. L.Q. 425, 434 (1986).

Vienna Convention, and does so on the basis of the privileges and immunities granted American diplomats by foreign states. The Act allows deviations from the Vienna Convention standards only on the basis of reciprocity. Id. Under 22 U.S.C. Section 4305 of the Foreign Missions Act passed by Congress in 1982, foreign government offices in the United States must notify the State Department of certain anticipated transactions, which may be as minor as interior renovation of a consulate.[26] The State Department has the right to approve or disapprove the transaction and does so on the basis of reciprocity. 22 U.S.C. Section 4301(c) of the Act states that:

> The treatment to be accorded to a foreign mission in the United States shall be determined

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[26]M. Griffin, Diplomatic Impunity, Student Lawyer, Oct. 1984, at 18, 21.

> by the Secretary after due consideration of the benefits, privileges, and immunities provided to missions of the United States in the country or territory represented by that foreign mission, as well as matters relating to the protection of the interests of the United States.

In his opinion, Judge Bork states that "[f]oreign governments may not all be expected to preserve the same equanimity in the face of hostile demonstrations that we require of domestic government." Finzer at 1461. In light of the current method of conducting foreign relations, Judge Bork's statement is erroneous. The United States looks in great part to the treatment its emissaries receive abroad to determine appropriate treatment for foreign representatives located in the United States.

Reciprocity as a basis for diplomatic relations enjoys widespread

application. In 1955, with the passage of the Diplomatic Immunities Restriction Act[27], Great Britain began extending privileges and immunities to foreign representatives stationed in Great Britain on the basis of the treatment received by British representatives abroad.

For three reasons, the 500 foot zone restriction is neither necessary nor narrowly tailored to further the national interest in protecting foreign diplomats from breaches of security while they are stationed in the United States as required under the Vienna Convention and Article I, Section 8, Clause 10 of the United States Constitution: 1) The ban only affects demonstrators carrying signs critical of the foreign nation represented by the mission, while it does

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[27] 4 ELIZ. 2 c.21, Section 1.

not affect demonstrators with the same message who do not reduce the message to a placard, nor demonstrators who support the policies of the nation represented; though no claim has been made by appellees that demonstrators in the first group present a greater risk to the mission's security. 2) The ban only affects those missions located in the District of Columbia though the international obligation of protection extends to all foreign representatives stationed throughout the nation. There is no basis for an argument that the District of Columbia presents a greater risk to the security of missions than does New York City, San Francisco or any other city in the nation. The only argument presented segregating demonstrations in the District of Columbia from those in other cities is

that since the District of Columbia is the nation's capital there is greater media coverage of events affecting the international community. On one hand, that statement is of questionable validity and would be difficult to prove, and on the other hand, the argument has nothing to do with the security interest. And finally, 3) there is no support for the notion that the District of Columbia requires more drastic measures for the security of missions than do other national capitals such as London and Moscow.

Conclusion

For the reasons expressed above, the 500 foot zone contained in Section 22-1115 should be struck down as unconstitutional. There can be no necessity for the statute on the basis of the dignity interest, since the dignity

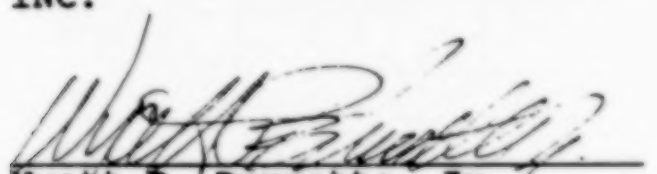
interest does not exist. Any suggestion of an interest involving dignity is certainly not clear or compelling; and if it were, the expression of political dissent via a placard is no affront to one's dignity. Accepting arguendo, that the dignity interest is a compelling governmental interest and that politically inspired messages of criticism are an affront to dignity, in the United States the First Amendment protects the individual's right to express political dissent.

For the reasons stated above, the D.C. statute bears no relation to the security interest.

It is respectfully submitted that the decision below should be reversed and

remanded and the relief sought by the petitioners should be granted.

LEGAL AFFAIRS COUNCIL AND
YOUNG AMERICANS FOR FREEDOM,
INC.



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